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SUPREME COURT OF THE UNITED STATES.

THE CITY OF WORCESTER,
Plaintiff in error,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY,
Defendant in error.

In error to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Two Cases.

Number 144, October Term, 1904.

Number 145, October Term, 1904.

THE CITY OF WORCESTER AND THE BOARD OF ALDERMEN OF THE CITY OF WORCESTER,
Plaintiffs in error,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY,
Defendant in error.

In error to the Superior Court of the Commonwealth of Massachusetts.

Two Cases.

Number 146, October Term, 1904.

Number 148, October Term, 1904.

THE CITY OF WORCESTER,
Plaintiff in error,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY,
Defendant in error.

In error to the Superior Court of the Commonwealth of Massachusetts.

Number 147, October Term, 1904.

BRIEF FOR THE PLAINTIFFS IN ERROR.

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[19137, 19138, 19139, 19140, 19149.]

JOHN R. THAYER,

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Plaintiff in error,
vs.
THE WORCESTER CONSOLIDATED STREET RAILWAY COMPANY,
Defendant in error.

In error to the Superior Court of the Commonwealth of Massachusetts.

Number 147, October Term, 1904.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

These are five cases, two being petitions for writs of mandamus, brought originally in the Supreme Judicial Court of Massachusetts, and two being bills in equity brought in the Superior Court for the County of Worcester in the Commonwealth of Massachusetts under the provisions of section 63 of chapter 113 of the Public Statutes of Massachusetts as amended by chapter 293 of the Massachusetts laws of 1891, and one being an action of contract brought originally in the Superior Court for the County of Worcester in said Commonwealth, brought to ascertain the legal effect of conditions contained in locations granted to the defendant in error in certain streets of Worcester. The same questions, so far as the present inquiry is concerned, are raised in all the cases, the different processes having been sought that there might be no failure in remedy by reason of a misconception as to the proper form of action.

The defendant in error is a street railway corporation established under the laws of the Commonwealth of Massachusetts, and especially under chapter 284 of the Laws of 1887, and prior to that time had locations in certain streets and ways in the city of Worcester.

At divers times, in 1891 and 1893, the defendants in error petitioned for extensions of its locations within the City of Worcester, under the provisions of section 21, chapter 113 of the Public Statutes of Massachusetts.

On April 10th, 1893, the defendant in error was, after due proceedings had in accordance with said section 21, chapter 113 of the Public Statutes of Massachusetts, given an extension of its location for tracks upon Trumbull, Green, Millbury and Greenwood Streets in said Worcester, by an order or decree which is to be found in full upon printed pages 6, 7, 8 and 9 (original pages 12, 13, 14, 15, 16, 17) of the record in No. 144; and upon the same printed pages of the record in No. 146 (pages 13, 14, 15, 16, 17 and 18 of the original.) The extension of said tracks is stated in said order or decree to be "located upon the following conditions." Then follow eleven conditions. The second of said conditions is as follows:

> "That said company shall lay and maintain block paving over and upon said location and streets, as follows: in Green street from the Boston and Albany Railroad tracks to Vernon square, between the rails and tracks and outside of the tracks to the line of the curbstone over such portions of said street as are at present unpaved. In Vernon square between the rails and tracks and outside of the tracks on the westerly side of said location, to the line of the curbstone, and outside of the tracks on the easterly side of said location for the width of ten (10) feet, parallel with said tracks to Millbury street. In Millbury street from Vernon square to the bridge at Quinsigamond, crossing the Blackstone river between the rails, between the tracks and outside of the tracks to the line of the curbstone on each side of said location over such portions of said street as are at present unpaved, and said company shall have the right to use so much of the present paving as shall be included within the line of said location. In Millbury street from said bridge at Quinsigamond to the terminus of said location, between the rails, between the tracks and eighteen inches outside thereof, and for the remaining width of said portion

of Millbury street the highway department of the city of Worcester shall cause to be laid a thorough and substantial macadam pavement to the lines of the curbstones, the expense of which shall be paid for by said company. Said pavements shall be of such quality and laid in such manner as said committee shall direct. In case said company shall fail to keep said pavements in proper repair to the satisfaction of said committee, the same may be repaired by said committee and the expense of such repairs shall be paid by the said company."

The tenth paragraph of said location provided:

"That the acceptance of this decree shall be made within thirty days from the date of said decree."

This order or decree granting the extension of location was duly accepted in writing by the defendant in error, and its acceptance filed in the office of the City Clerk of the City of Worcester, all as required by said order or decree, within the said thirty days.

On the tenth day of April, 1893, after due proceedings had in accordance with said section 21, chapter 113 of the Public Statutes of Massachusetts, the defendant in error was, by order or decree, given an extension of its location for tracks in said Worcester, in Park Avenue, through Pleasant to June Streets. Said order or decree of extension of location is to be found in full upon printed pages 6 and 7 (original pages 12, 13, 14, 15, 16) of the record in No. 145, and upon the same pages of the record in No. 147. Said order or decree of location stated that the extension of location of said tracks was "located upon the following conditions." Then follow ten conditions, the second of which is as follows:

"That said company shall lay and maintain block paving between the rails of each track, the whole space between the tracks and for the space

of eighteen inches outside of the tracks. Said paving blocks shall be of full size and their quality and manner of laying the same shall meet with the approval of the joint standing committee on highways and sidewalks. And for the remaining width of said Pleasant street, for the entire length of said location the highway department of the city of Worcester shall cause to be laid a thorough and substantial macadam pavement to the lines of the curbstones, the expense of which shall be paid for by said company."

The ninth condition in said order or decree of location requires:

"That the acceptance of this decree shall be made within thirty days from the date of said decree."

This order or decree granting the extension of location was duly accepted in writing by the defendant in error, and its acceptance filed in the office of the City Clerk of the City of Worcester, all as required by said order or decree, within the said thirty days.

On the twenty-fourth day of April, 1893, the defendant in error, after due proceedings had in accordance with said section 21, chapter 113 of the Public Statutes of Massachusetts, was given an extension of its location for tracks on Pleasant Street, between West Street and Park Avenue, the order or decree granting said extension of location containing ten different conditions, the second of which was as follows:

"The said company shall lay and maintain block paving between the rails, between the tracks and outside of the tracks to the line of the curbstones for the entire length of said location and the quality of the blocks and manner of laying the same shall meet with the acceptance of the joint standing committee on highways and sidewalks. In case said company shall fail to keep the paving

in a proper state of repair, the same may be repaired by said committee and the expense of such repairs shall be paid by said company."

This location was duly accepted in writing by the defendant in error and such acceptance filed in the office of the City Clerk of the City of Worcester within thirty days after its passage.

On the eleventh day of May, 1891, the defendant in error was, after due proceedings had in accordance with said section 21, chapter 113 of the Public Statutes of Massachusetts, given an extension of its location for tracks in Washington Square, Shrewsbury and Belmont Streets, which extension is stated in the order or decree giving the same, to be "located upon the following conditions"; eight different conditions then follow, among which is the following:

> "Second. That block paving shall be laid and maintained between the rails of its track and for a distance of eighteen inches outside of said rails for the entire distance covered by this location."

This order or decree was duly accepted in writing by the defendant in error and its acceptance filed with the City Clerk of the City of Worcester.

On the twenty-fourth day of April, 1893, the defendant in error was, after due proceedings had in accordance with said section 21, chapter 113 of the Public Statutes of Massachusetts, again given an extension of its location for tracks in Washington Square, Shrewsbury Street and a portion of Belmont Street, the order or decree giving the same stating that said tracks were "located upon the following conditions." Then ten different conditions follow, the second of which is printed upon printed pages 9 and 10 (original Page 19) of the record in No. 148, but which is in substance the

same as the second condition of the location in Trumbull, Green, Millbury and Greenwood Streets, given April 10, 1893, printed heretofore on pp. 3 and 4 of this brief and required the defendant in error to lay and maintain block paving between the rails, between its tracks and outside thereof to the line of the curb-stones over a portion of said location. This location was duly accepted by the defendant in error, in writing, and the acceptance filed with the City Clerk of the City of Worcester.

On the eighth of May, 1893 the defendant in error was, after due proceedings had in accordance with said section 21 of chapter 113 of the Public Statutes of Massachusetts, given an extension of location for its tracks upon Grove Street and Park Avenue, which tracks are stated in the order or decree granting the same to be "located upon the following conditions."

The second of said conditions is printed in full upon printed page 12 (original pages 25 and 26) of the record in No. 148, and required paving and maintenance of paving of entire street between curbs for a part of the street and between the rails and tracks and for a distance of eighteen inches outside thereof for the remainder of the distance. This location was duly accepted in writing by the defendant in error, which acceptance was filed with the City Clerk of the City of Worcester.

One petition for a writ of mandamus, being numbered 144 of this record, is brought to enforce the second condition of the location for tracks in Trumbull, Green, Millbury and Greenwood Streets, given on April 10, 1893. The bill in equity numbered 146 of this record, in which the Board of Aldermen were joined with the City of Worcester as plaintiffs in error, under the provisions of section 63, chapter 113 of the Public

Statutes of Massachusetts, as amended by chapter 293, Massachusetts Laws of 1891, is brought to enforce the same condition.

The second petition for a writ of mandamus, being numbered 145 of this record, is brought to enforce the second condition contained in the order or decree for location in Park Avenue, through Pleasant Street to June Street, and the bill in equity numbered 147, being by the same parties plaintiffs as in No. 146 and brought under the same provision of statute as No. 146, is to enforce the same condition.

The action of contract, the record in which is numbered 148, is brought to collect for expenditures made by the City of Worcester in repairing the block paving which, under the conditions of certain locations referred to at length in the declaration therein, was to be maintained in repair by the defendant in error. There are seven counts in the declaration in said action of contract, all the counts being founded upon restrictions, terms or conditions contained in grants of location. The first and second counts of said declaration are for expenditures made for repairs made at different times by the plaintiff in error for keeping in repair the block paving which the defendant in error was by its location of April 24, 1893 for extension of tracks in Pleasant Street between West Street and Park Avenue, required to maintain in repair. The third count is for expenditures made upon the same streets and by virtue of the same locations described in the first petition for a writ of mandamus, and in the first bill in equity, the records in which are numbered respectively 144 and 146. The fourth and fifth counts of the declaration relate to expenditures made under two different locations, the first one in each count being for expenditures made to repair the streets and portions of streets required by the

location of May 11, 1891, in Washington Square, Shrewsbury and Belmont Streets to be maintained in repair by the defendant in error, and the second location in each of said counts being for expenditures made upon the portions of streets required by the location of April 24, 1893, in Washington Square, Shrewsbury and Belmont Streets, to be maintained in repair by the defendant in error. The sixth and seventh counts of said declaration are for expenditures made in repairing the streets required by the location of May 8, 1893, in Grove Street and Park Avenue, to be maintained in repair by the defendant in error.

The pleadings of the plaintiff in error in all five cases allege the granting of the locations with the accompanying restrictions or conditions as hereinbefore described and the acceptance of them by the defendant in error, in writing, filed with the City Clerk of the City of Worcester, the laying of the tracks and doing of the work originally required by all said locations and a wearing-out, roughness and unfitness for further use of the paving upon the portions of streets required by said locations to be kept in repair by the defendant in error and a refusal by the defendant in error to make further repairs and to keep said streets safe for travel, as required by said restrictions or conditions. The petitions for writs of mandamus and the bills in equity contain prayers for mandatory relief to compel the defendant in error to make repairs and for other relief. The counts in the action in contract further allege the expenditure by the plaintiff in error of considerable sums of money, aggregating in all ten thousand thirty-one dollars and thirty-three cents (10,031.33), exclusive of interest, for the purpose of making the repairs which were required by the restrictions or conditions of locations, to be made by the defendant in error. The

defendant in error filed substantially the same demurrer in all the cases, the substance of which, so far as this proceeding is concerned, is

First, that the conditions contained in said grants of location were illegal and void, and

Second, that by Act of the Legislature of the Great and General Court of Massachusetts, chapter 578 of the Acts of Massachusetts for the year 1898, it had been relieved of any obligation to keep the streets in repair. The demurrers of the defendant in error were sustained upon the second of these grounds. The opinion of the Supreme Judicial Court of Massachusetts, printed in the record in each case (printed pages 16, 17, 18, and 19, original pages 38, 39, 40, 41, 42 and 43 of the record in No. 144, printed pages 16, 17, 18, and 19 original pages 35, 36, 37, 38, 39, 40 and 41 of No. 145, printed pages 17, 18, 19 and 20 original pages 40, 41, 42, 43, 44, 45 and 46 of No. 146, printed pages 17, 18, 19 and 20 original pages 39, 40, 41, 42, 43, 44 and 45 of the record of No. 147, and printed pages 20, 21, 22 and 23 original pages 82, 83, 84, 85, 86, 87 and 88 of the record of No. 148) a single opinion having been given for all the cases, as they were all five argued together before the Supreme Judicial Court of Massachusetts, refers, for the discussion of the constitutional grounds upon which the cases are decided adversely to the contention of the plaintiffs in error, to Springfield vs. Springfield Street Railway Company, 182 Massachusetts, Page 41. The opinion in the Springfield case decides as to the Federal constitutional questions raised that locations given to street railways in streets "do not constitute contracts, or if they do, they are of such a nature that the Legislature can modify or annul them without thereby violating the constitutional provisions", (182 Massachusetts, Page 48). The assignment of

errors by the plaintiff in error is the same in each of the five cases and is to be found upon printed page 15 (original pages 35 and 36) of the record in No. 144; printed page 15 (original pages 33 and 34) of the record in No. 145; printed page 16 (original pages 38 and 39) *of the record in No. 146*; printed page 16 (original pages 37 and 38) of the record in No. 147; and printed pages 18 and 19 (original pages 80 and 81), of the record in No. 148.

The assignments of error are five, in substance as follows:

1. The court erred in deciding that the effect of c. 578, Massachusetts Laws of 1898, was to free the Street Railway Company from all obligation to keep the surface material of streets in repair, unless imposed in the grants of the original location.

2. The court erred in deciding that the locations granted to the defendant did not constitute contracts, or if they did, that the Legislature could modify or annul them without thereby violating the provisions of the constitution.

3. The court erred in deciding that it was within the constitutional power of the Legislature to free the defendant in error from obligations imposed upon it by the locations set out in the pleadings.

4. The court erred in deciding that the provisions of c. 578, Massachusetts Laws of 1898, relieving the defendant in error from all obligation thereof to keep any portion of the surface material of streets in repair, as required under the provisions of the location set out in the pleadings, were not unconstitutional as being an impairment of the obligations of contracts under subdivision 1, s. 10, Art. 1, Constitution of the United States.

5. The court erred in deciding that the provisions of c. 578, Massachusetts Laws of 1898, relieving the defendant in error from all obligation to keep any portion of the surface material of the streets in repair, as it was required to do under the locations set out in the pleadings, were not unconstitutional under the Fourteenth Amendment of the Constitution of the United States, as depriving the City of Worcester of its property and property rights without due process of law.

In order to determine the questions raised by these assignments of error, a frequent reference to certain sections of the Street Railway Law of Massachusetts as it was at the time of the granting of extensions of locations in question, and as modified by the provisions of said c. 578, Massachusetts Laws of 1898, may be necessary, and for convenience, the sections which are regarded by the plaintiff in error as material to the inquiry are here printed. The italics are not in the statute but are used to direct attention to those clauses which the plaintiff in error regards as especially significant.

Sections from c. 113 of the Massachusetts Public Statutes in force at the time the extensions of locations referred to in the Record were applied for and granted.

> "Sect. 7. The board of aldermen of a city or the selectmen of a town, upon the petition of such directors or a majority thereof for a location of the tracks of the railway therein, shall give notice to all parties interested, by publication in newspapers or otherwise as they may determine, at least fourteen days before their meeting, of the time and place at which they will consider such location, and after a hearing they shall pass an order refusing such location, or granting the same or any portion *thereof under such restrictions as they deem the interests of the public may require;* and the

location thus granted shall be deemed and taken to be the true location of the tracks of the railway, if an acceptance thereof by said directors in writing is filed with said mayor and aldermen or selectmen within thirty days after receiving notice thereof."

"Sect. 21. The board of aldermen or the selectmen may, from time to time, *under such restrictions as they deem the interests of the public may require*, upon petition, authorize a street railway company whose charter has been duly accepted and whose tracks have been located and constructed, or its lessees and assigns, to extend the location of its tracks within their city or town, without entering upon or using the tracks of another street railway company; and such extended location shall be deemed to be the true location of the tracks of the company, if its acceptance thereof in writing is filed in the office of the clerk of the city or town within thirty days after receiving notice thereof. Before acting upon the petition, at least fourteen days' notice of the hearing shall be given to all parties interested, by publication in such newspapers as the board of aldermen or selectmen may determine, or otherwise."

"Sect. 32. Every street railway company shall keep in repair, to the satisfaction of the superintendent of streets, street commissioner, road commissioners, or surveyors of highways, the paving, upper planking, or other surface material of the portions of streets, roads, and bridges occupied by its tracks; and if such tracks occupy unpaved streets or roads, shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks, and shall be liable for any loss or injury that any person may sustain by reason of the carelessness, neglect, or misconduct of its agents and servants in the construction, management, and use of its tracks."

Sect. 43 authorizes the directors of railway companies to establish rates of fares and Sect. 44 authorizes an

application under certain conditions to the Board of Railroad Commissioners for a revision and regulation of fares. Then follows Sect. 45:

> "Sect. 45. Nothing contained in the two preceding sections shall be held to authorize a company or said board to raise the rate of fare or the price of tickets above the rate or price established for a locality by agreement made as a condition of location or otherwise between a company or its directors and the mayor and aldermen of a city or the selectmen of a town, except by a mutual arrangement with such mayor and aldermen or selectmen."

The material portions of c. 578, Massachusetts Laws of 1898 are as follows:—

> Section 1. * * "'Location' shall mean the grant to a street railway company by vote or order of a board of aldermen of a city or selectmen of a town, when duly accepted by such company, of the right to construct, maintain and operate a street railway in a public highway or street in such city or town. And 'original location' of a company in any city or town shall mean the first location granted to it in such city or town."

Sects. 2 to 5, both inclusive, relate solely to taxation.

Sect. 6 requires a return to the assessors of each town and city of the length of track operated by it and its gross receipts.

Sect. 7 is as follows:—

> "Section 7. On or before the first day of November in each year the assessors of every city and town in which any street railways are operated shall assess on each company operating such railways therein, an excise tax of an amount equal to such proportion of the following percentages of the gross receipts of such company as the length of tracks operated by it in public ways

of such city or town bears to the total length of tracks operated by it in public ways, to wit:—

"In case of companies whose annual gross receipts per mile of track operated are four thousand dollars or less, one per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than four thousand dollars and less than seven thousand dollars, two per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than seven thousand dollars and less than fourteen thousand dollars, two and one-quarter per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than fourteen thousand dollars and less than twenty-one thousand dollars, two and one-half per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than twenty-one thousand dollars and less than twenty-eight thousand dollars, two and three-quarters per cent. of the total annual gross receipts; and in case of companies whose annual gross receipts per mile of track operated are twenty-eight thousand dollars or more, three per cent. of the total annual gross receipts. The excise tax provided by this section shall be in addition to the taxes now provided by law."

Sect. 8 is as follows:—

"Section 8. At any time after the end of three years from the first day of October, in the year eighteen hundred and ninety-eight the selectmen of any town, or the aldermen of any city, or any street railway company operating in such town or city, may petition the board of railroad commissioners for a revision of the amount of the excise tax to be thereafter paid by said company under the preceding section; and said board shall thereupon proceed to investigate and determine, after

public notice, and a hearing at which said selectmen or aldermen and said company may submit such evidence as may be pertinent, the average annual cost to said town or city of the work done by it during the preceeding three years under the provisions of this act which by law it was not previously required to do, and also the average annual payments made by said company to said town or city under and pursuant to said section during said three years; and having ascertained and determined said average annual cost and average annual payments, said board shall thereupon determine and fix the proportion of the percentage of the gross receipts which shall be paid as an excise tax under said section by the company to said town or city annually thereafter, said proportion to be fixed at such a rate as will be necessary to yield to said town or city annually thereafter an amount equal to the average annual cost to said town or city of the work done by it during the preceding three years under the provisions of this act and which it was not by law previously required to do, as determined as aforesaid; and the proportion of the percentage so fixed shall not be again changed for the period of three years, and not, except in the manner herein provided. Said board may at any time upon petition therefor by any city or town entitled to any part of the excise tax paid by any street railway company, after such notice as the board may order to all other cities and towns entitled to share in the excise tax paid by said company, and after a hearing, determine as to the distribution thereof among the several cities and towns in which such company operated any part of its railway, and fix the proportions thereof to which they shall respectively be entitled, which shall thereafter be the proportions of said excise tax to be assessed upon said company under the provision of this act, instead of the proportion based upon length of tracks as hereinbefore provided."

Sects. 9 and 10 relate to the collection and use of this excise tax.

Sect. 11 is as follows:—

"Section 11. Street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair, *but they shall remain subject to all legal obligations imposed in original grants of locations*, and may, as an incident to their corporate franchise, and without being subject to the payment of any fee or other condition precedent, open any street, road or bridge in which any part of their railway is located, for the purpose of making repairs or renewals of the railway, or any part thereof, the superintendent of streets or other officer exercising like authority, or the board of aldermen or selectmen, in any city or town where such are required, issuing the necessary permits therefor." * * * * * *

Sect. 12 relates to the clearing of snow from tracks and sect. 13, after providing for petition and notice upon the same for original location, continues :

Section 13. * * * * "In granting said location they may prescribe the manner in which said tracks shall be laid, and the kind of rails, poles, wires and other appliances which shall be used, and they may also impose *such other terms, conditions and obligations in addition to* those applying to all street railways under the general provisions of law, as the public interest may in their judgment require; and the location thus granted shall be deemed and taken to be the true location of the tracks of the railway, if an acceptance thereof in writing by said directors is filed with said board of aldermen or with said selectmen within thirty days after receiving notice of the granting of the location. * * * (Provisions as to protest of abutters and construction). * * * * * * "*All locations heretofore granted or in use are hereby ratified and confirmed, as if accepted under the provisions of*

this section, and shall continue in force, subject only to revocation as provided in section seventeen, and to all provisions, restrictions, regulations or conditions, applying to all street railways under the general law as now in force except so far as changed or modified by this act."

Sect. 14 relates to procedure in case of failure to obtain original location connecting two cities or towns.

"Section 15. The board of aldermen of a city or the selectmen of a town, upon the petition of fifty legal voters or the board of directors of a street railway company whose tracks are located in said city or town, and after notice and hearing as provided in section thirteen of this act, may grant a location for the extension of the tracks of such company and prescribe the manner in which said tracks shall be laid and the kind of rails, poles, wires and other appliances which shall be used; but they shall not impose as terms or conditions of such grant any obligations other than or in addition to those applying to all street railways under the general law in force at the date of the passage of this act, or such as may have been imposed in the original grant of location to such company in such city or town subsequent to the passage hereof. The provisions of section thirteen of this act as to acceptance, and as to protest of abutters and approval by the board of railroad commissioners, shall apply to grants of extensions under this section."

Sect. 16 relates to alteration of location.

Sect. 26 repeals sects. 7, 21, 23, 27, 32, 44 and 45 of c. 113, Public Statutes of Massachusetts.

ARGUMENT.

The questions to be considered in cases of this nature and the order of their discussion pointed out in St. Paul Gas Light Company vs. City of St. Paul, 181 U. S. 142, at page 147, will be followed in this argument as nearly as possible and are as follows, viz.:

I. WAS THERE A CONTRACT?

II. IF YES, WHAT OBLIGATIONS AROSE FROM IT?

III. IS THERE PROPERTY OR A PROPERTY RIGHT WHICH HAS BEEN TAKEN AWAY WITHOUT DUE PROCESS OF LAW?

IV. HAS THERE BEEN STATE LEGISLATION IMPAIRING THE CONTRACT OBLIGATIONS?

V. WHAT IS THE PROPER FORM OF REMEDY?

I

WAS THERE A CONTRACT?

To put the question in other phrase, it is: Whether the conditions inserted in the locations referred to in the pleadings of the plaintiff in error, given to the defendant in error, when accepted by the defendant in error in writing by an acceptance filed with the City Clerk of the City of Worcester, constituted contracts within the meaning of that word in Section 10, Art. 1, of the Federal Constitution?

The discussion of this question resolves itself into the subsidiary inquiries:

1. Were the conditions contained in the grants of extensions of locations to the defendant in error fairly comprehended within "restrictions" as used in the statute and therefore legally imposed under the law in force when the locations were granted?

2. Were the city and street railway company by implication and outside the express terms of the statutes empowered to enter into such contracts? and

3. Did the acceptance of this location, with such conditions, constitute a contract between the plaintiff in error and the defendant in error.

1

Were the conditions contained in the grants of extensions of locations to the defendant in error, fairly comprehended within "restrictions" as used in the statute and therefore legally imposed under the laws in force when the locations were granted?

This subject is not discussed in the opinion of the Supreme Judicial Court in these cases, nor is there any other decision of the Massachusetts court specifically determining it.

Section 21 of Chapter 113 of the Massachusetts Public Statutes under which the extensions of locations were granted, provided that "the Board of Aldermen . . . may, from time to time, under such restrictions as they deem the interests of the public may require, upon petition, authorize a street railway company whose charter has been duly accepted and whose tracks have been located and constructed, or its lessees or assigns, to extend the location of its tracks within their city . . ."

It is contended in behalf of the plaintiff in error that the paragraphs relating to maintenance of paving are technical restrictions, as that word is used in said section 21.

A

As to abstract definitions of restrictions.

"Restriction" is in its abstract signification a broader and more comprehensive word than is "condition." While "condition" may be more emphatic in the

narrow field that it comprehends, it is not so broad and inclusive as the word "restriction".

National Life Association v. Berkeley, 97 Va. 571.

Even in the technical signification of the words as applied to conveyances of real estate, the words "restrictions" and "stipulations" are analagous to "conditions.'

Smith vs. Bradley, 154 Mass. 227.
Hamlen vs. Werner, 144 Mass. 399.
Bagnall vs. Davies, 140 Mass. 78.
Beals vs. Case, 138 Mass. 140.
Tobey vs. Moore, 130 Mass. 448.
Peck vs. Conway, 119 Mass. 548.
Linzee vs. Mixer, 101 Mass. 512.

In conveyances also the word "condition" is defined as a "restriction" and vice versa.

LaBerree vs. Carlton, 53 Maine 211–213.
Cooper vs. Green, et al. 28 Ark. 48, at 54.

"A condition is a qualification or restriction."

Heaston vs. Randolph County Commrs. 20 Ind. 398-403.
Johnson vs. Gurley, 52 Texas 222-226.
Thornton vs. Trammell, 39 Ga. 202-207.
Langley vs. Ross, 55 Mich. 163.
Blanchard vs. Detroit etc Co., 31 Mich. 43.
Detroit Union R'way vs. Fort St. Co., 128 Mich. 184.
Warner vs. Bennett, 31 Ct. 468.

It has been held that the words "conditions" and "restrictions" in an authority to grant permission to lay railroad tracks import simply a qualification or limitation of the gift to which they are annexed.

North Hudson Co. vs. City of Hoboken, 41 N. J. Law 71-76.

Condition is defined as "a restriction placed upon the use of a thing."

Anderson's Law Dictionary.

Condition is defined by Bouvier to be "a qualification, restriction or limitation, modifying or destroying the original act with which it is connected."

The language of the Supreme Judicial Court of Massachusetts in construing the word "condition" in a deed, in Ayling v. Kramer, 133 Mass. 12 at page 13, is especially appropriate. "We are of opinion that the so called conditions in the deed to Carter were not intended or understood by the parties to be technical conditions, a breach of which would work a forfeiture of the estate. They were intended to regulate the mode in which the grantee might use and enjoy the land, and are to be construed as restrictions."

Episcopal City Mission v. Appleton, 117 Mass. 326.

Skinner v. Shepard, 130 Mass. 180.

B

Specific decisions and arguments therefrom.

In Newcomb vs. Norfolk Western Street Railway Co., 179 Mass. 449, it was held that

> "the requirement in § 23 of the grant of the location to the respondent that it shall water the street over a portion of the way between certain dates was a lawful restriction within Pub. Sts. c. 113, § 7, which allowed selectmen to grant a location 'under such restrictions as they deem the interests of the public may require.' The well known effect of running cars is to raise a dust, and the requirement, although affirmative in form, in substance restricts the respondent to running cars in such a way as not to raise a dust."

The descriptive word used in the grant of extension by the public officers of the city of Worcester, whether "restrictions" or "conditions," is of slight significance; the real question to be determined upon this branch of the case is whether in essence the paragraphs which the Board of Aldermen of Worcester inserted in the grants of extensions of location to the defendant in error were in legal intendment restrictions or not. Or, in other words, whether they are similar to the street watering clause which the Supreme Judicial Court of Massachusetts in Newcomb vs. Norfolk Western St. Ry. Co. termed "requirements," and therefore properly comprehensible within the word "restrictions," or whether they were something outside of it.

It is as much, and no more, a restriction upon the right of the defendant in error to use the streets of Worcester for operating a street railway, to require it to keep the paving over the entire length of the street in proper repair, than it is to require it to water the street in which the tracks may be located, from curb to curb.

The requirement of maintenance and repair of paving is a limitation or abridgement upon the right of the defendant in error to use the streets for the purpose of street railway traffic.

The requirement to water the street from curb to curb, although affirmative in form, and continuous from year to year in substance, was sustained as a lawful restriction upon the company so to run its cars as not to raise dust. At least, with equal force it may be argued that a restriction requiring the maintenance of block paving between the rails and for a space of 18 inches outside in some streets, and from curb to curb in others, was in fact a requirement that the railway company so construct and maintain its tracks as not to injure the street and make it as a whole unduly injurious and dangerous to other travel. It is common

knowledge that if a street in which street railway tracks are laid has a perceptible grade, it is practically impossible to keep the surface of the street between and about the rails in such repair as to be safe and convenient for travel, or for use for railway purposes, unless some kind of pavement is laid. It is also a matter of common observation that the use of that portion of the streets, in which street railway tracks are laid in populous cities, is to a great degree practically prohibitive of travel by general teaming over that portion of the street, which necessarily brings upon the portions of the street outside the tracks very great increase of use and wear beyond what would exist if no tracks were in the street.

The word "restrictions" itself imports that the thing referred to shall be permitted to be exercised only in a modified form, and not absolutely or unqualifiedly.

C

As to contemporaneous construction of meaning of restrictions.

"A contemporaneous is generally the best construction of a statute. It gives a sense of a community, of the terms made use of by the Legislature."

Packard v. Richardson; 17 Mass. 122, at 144.

It appears from the report of the special committee appointed to investigate the relations between cities and towns and street railway companies, under the authority of Chapter 509 of the Mass. Laws of 1897, being House Document No. 475 of the Laws of 1898, on pages 22 and 23, that it has been the generally accepted view that "restrictions" has had in practice a very broad meaning.

> "The Committee is aware that different views exist on the meaning of the present law. By some

it is held that the "restrictions" of street railway locations in the several statutes relating thereto are limited, and that any additional terms exacted or conceded are, in legal phraseology, *ultra vires*, and cannot be enforced in law. This, however, is not the view usually taken, and, confessedly, the practice has been and now is widely at variance with it.* Such a literal construction of the statute, if sound in law, would result in a noticeable breach in that principle of local self-government which is the basis of the Massachusetts polity. It would, indeed, carry the principle of centralized State control in this matter far beyond the point even, to which it is carried in the countries of continental Europe.

In the view of the Committee, however, the present Massachusetts system, while somewhat undefined and even contradictory in character,— as is not infrequently the case with a system built up by degrees as the work of a succession of legislative bodies,— tends to treat this whole matter of street railways as one of local concernment. It is regarded as simply a question of the use which a given municipality sees fit to make of its thoroughfares. The municipalities are held to be the best, and, indeed, within broad limits, the only, judges of that use; just as the railway corporations are the best, and again the only, judges as to the degree of protection afforded by the grants they accept. If municipalities or corporations choose, from overeagerness or for other reasons, to enter into ill-advised or improvident agreements, which they afterwards repent, that is their affair; and the

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[* "The law is very simple upon this point. It says that locations may be granted with such restrictions as in the judgment of the selectmen or the aldermen the public interests may require. But these local officials have in practice enlarged the word 'restrictions' so that it is made to include 'terms and conditions' also. To all practical intents and purposes the law might just as well read that locations shall be granted upon such 'terms, conditions, provisions and agreements' as the selectmen may in any case decide." (Argument of E. W. Burdett, counsel for the Massachusetts Street Railway Association, before the Committee, page 103.)]

officials entering into such agreements are responsible to their constituencies, whether the body of citizens or the holders of the company's stock. It certainly is not the part of the Commonwealth either to prescribe the terms of grants, or, after they are made, to examine those terms with a view to seeing that they contain nothing of which the parties to them may thereafter repent. In this view of the matter, it would seem, on the one hand, that improvident concessions of an apparently perpetual character may have been, perhaps were, made by the agents of the municipalities, and valuable privileges were conferred, not coupled with corresponding obligations. On the other hand, in their eagerness to secure these valuable concessions and privileges, the corporations may have seen fit to regard the reservation which accompanied them as a mere matter of form. Under the system in use in Massachusetts, it was, as it now is, in the power, as it was and is the duty, of those representing both municipalities and companies to insist on more specific and better-considered grants, covering, if thought best, a given term of years, and binding in law during that term."

2.

Were the city and street railway company by implication and outside the express terms of the statute empowered to enter into such contracts relative to paving?

It is clear that the subject matter, namely, the repair of streets, was one about which the city had a right to contract.

As a preliminary observation, it is important to bear in mind throughout this branch of the discussion that, under the Massachusetts law, a municipality may lawfully make a contract to relieve itself from the expense of keeping a public way in repair for all time. Such

a contract was before the court in Brookfield vs. Reed, 152 Mass. 568, where the court says at page 573 —

> "It is objected that the contract is illegal, because by it the town has deprived itself of the control and regulation of the way. But it cannot have that effect. The contract provided a mode in which the town might perform its duty to keep a public way in repair. It did not obviate that duty, or relieve the town from liability for want of repair in the way. It cannot prevent the lawful discontinuance of the way, and it will not be construed as intending to do that. The subject matter is a public way, and if that should cease to exist, the obligation of the town to maintain the way and the bridge, and the obligation of the defendants to keep the way in repair, would cease. . . . . We have no doubt that the plaintiff could lawfully receive from individuals an obligation to relieve it from the expense of keeping a piece of public way in repair for all time. Hawks vs. Charlemont, 107 Mass. 414. Arlington vs. Cutter, 114 Mass. 344, and cases cited. Deane vs. Randolph, 132 Mass. 475. Sullivan vs. Holyoke, 136 Mass. 272. Waldron vs. Haverhill, 143 Mass. 582."

See to the same point:

Springfield vs. Harris, 107 Mass. 532.
Melrose vs. Hiland, 163 Mass. 303-311.
Atkinson vs. Newton, 169 Mass. 240.
Bell vs. Newton, 183 Mass. 481.

So far as the City of Worcester is concerned, it must be taken as established by the foregoing authorities that it had a right to contract with reference to the repair of its streets, unless there is some inhibition expressly contained in or fairly to be implied from the statutes governing the relations between the municipality and the street railway company, and unless there is something in the law rendering such contracts outside the power of the street railway company.

A

Worcester Gas Light Co. vs. Worcester, 110 Mass., 353.

The Supreme Judicial Court of Massachusetts has clearly recognized the correctness of the principle for which the plaintiff in error contends in Worcester Gas Light Company vs. Worcester, 110 Mass. 353. But for the decision in the cases at bar that case would be conceded to establish the plenary authority of the municipality to contract with reference to constructions interfering with the surface of the streets. The case related to the authority of the local authorities of the City of Worcester to make a contract with reference to the laying of gas pipes in the streets of the City of Worcester. In 1849, a voluntary unincorporated association was formed by certain citizens of Worcester, for the purpose of supplying gas, which made application for leave to lay pipes in the streets and to erect gas works. Thereupon, an order was passed by the City Council on May 3, 1849, designating certain streets in which the association might lay pipes and containing further provisions with reference to the price at which gas should be furnished both to citizens and to the city. At this time there was no general law or special act authorizing the laying of gas pipes in streets.

In 1851, the associates, who had laid down the pipes and accepted the order, became incorporated as the Worcester Gas Light Company, under c. 159, Laws of 1851, and by vote assumed the liabilities imposed by the original order of the city council upon the associates. S. 4 of said c. 159 authorized the corporation "with the consent of the mayor and aldermen of the City of Worcester" to open ground in the streets and highways of the city for the purpose of sinking and

repairing pipes. There was no general law authorizing the laying of gas pipes at this time, the first statute in relation to gas light companies and their authority to open streets being c. 146, Laws of 1855, The corporation which succeeded to the original associates refused to carry out the contract as to the price of gas, and sued the city to recover its own price. Counsel of international distinction argued the case for the Gas Co. Yet the Supreme Judicial Court of Massachusetts in 110 Mass. at p. 355 held that "the order of the city council passed May 3, 1849, having been accepted and acted upon by the original proprietors of the Worcester Gas Light Company, created a *contract* between the company and the city. The act of incorporation of the plaintiffs provides that the corporation 'shall assume all the liabilities of the present proprietors of the gas light works in Worcester, in relation to the making and selling of gas.' St. 1851, c. 159, s. 5. By accepting this act the plaintiffs therefore assumed and came under the liability, as to furnishing gas to the city, created by this contract."

There can be no distinction between an authority on the part of the city to contract with reference to the digging in a street for the purpose of laying gas pipes and its authority to deal by contract with a street railway company for the purpose of laying tracks upon or near the surface of the street. The principle governing the two situations must be the same.

B

Argument for competency of parties to make contract from Mass. statutes.

This question can be most intelligently discussed by a survey of the history of street railway legislation in Massachusetts. The first general law applicable to street railway companies was passed in 1864. No law

was passed authorizing the incorporation of street railway companies by any general statutory provision, until 1874. Prior to that time, all street railway corporations were created by special act of the Legislature, the first having been passed in 1853. Between that time and 1871, more than seventy special acts of incorporation were passed. A schedule of these statutes is printed as "Appendix C" in this brief. They are all framed upon two general types, with such modifications as the special requirements of any particular municipality may have rendered wise.

The statute creating the Worcester Horse Railroad Company, which is c. 148, Mass. Laws of 1861, (to whose rights, franchise, liabilities and obligations the defendant in error has succeeded by c. 141, Mass. Laws of 1867, c. 356, Mass. Laws of 1869, and c. 284, Mass. Laws of 1887,) is printed as "Appendix A" to this brief, and is a fair type of the provisions contained in the earlier statutes. The other type of statutes is fairly illustrated by c. 181, Mass. Laws of 1866 incorporating the Cohasset & Scituate Street Railway Co. printed as Appendix B. An examination of the provisions and a careful search through all the special acts referred to in "Appendix C" fails to show any special or express authority on the part of the municipality or the company to contract with each other as to repair of streets, or with reference to any other subject matter except the purchase of the company by the municipality. At least thirty-seven of these statutes contain sections authorizing such a purchase, which sections are referred to in said "Appendix C", and which authorization is in section 12 of the statute printed in "Appendix A." The power conferred upon the municipal authorities in section 1 of the act (c. 148, Mass. Laws of 1861) is to fix or designate the streets and portions of streets in which the tracks may be constructed. Section 9

gives the mayor and aldermen authority to change the grade of the streets in which tracks may be constructed, and the grade at which they shall be laid. There is no where else in the statute any express enactment corcerning a power to contract, nor is any such authority to be found in any of the acts printed in schedule "C". But it is a matter of common knowledge that such conditions were constantly inserted in locations. The printed volume of street railway locations granted for street railways in the city of Boston, prior to November 1, 1894, shows many conditions as to paving and use and repair of streets inserted in locations.

In view of this situation, the Legislature came to the enactment of its first general law respecting this class of corporations, which was chapter 229 of the laws of 1864, and was entitled "An Act Concerning Street Railway Corporations."

Section 12 of this act recognized the intimacy of relation between the company and the municipality by the requirement that the act of incorporation should be accepted by the city council of the city or the selectmen of the town within one year after any act of incorporation should be passed.

Section 14 of this act contains the first legislative use of the word "restrictions", which is as follows:—

> "Section 14. The board of aldermen of any city, or the selectmen of any town, in which any corporation is authorized to construct a street railway, may, upon the petition of such corporation, locate the tracks thereof within their respective jurisdiction, pursuant to the provisions of its charter: provided, that before proceeding to locate such tracks, they shall give notice to all parties interested, by publication in such newspapers, or otherwise, as they may determine, at least fourteen days before their meeting, of the time and place at

which they will consider such location. After a hearing of all parties interested, they shall pass an order refusing the location, or granting the same, or any portion thereof, *under such restrictions as they deem the interests of the public may require*, and the *location thus granted* shall be deemed and taken to be the true location of the tracks of the corporation, if its acceptance thereof, in writing, is filed with said *mayor and aldermen or selectmen within thirty days* after receiving notice thereof. The location and position of any tracks may be altered upon application of any party interested, by the same authority, and in the same manner, as is herein provided for the original location. The expense of such alteration shall be borne by such party as the board of aldermen or selectmen may determine."

Yet, alongside of this section in the same act, the Legislature not only recognized the pre-existing authority of municipalities and street railway companies to contract, but expressly preserved the obligation of all such contracts in section 45, which is as follows:—

"Section 45. All acts and parts of acts inconsistent herewith are hereby repealed. But nothing in this act contained shall operate to annul or impair in any wise any terms or conditions upon which any charter has been accepted, or location or other privilege granted by any city or town, and which have been assented to by such corporation."

In 1866, two further acts were passed, general in their nature, relating to corporations of this class. Chap. 286 of the Mass. Laws of 1866, contained a general enactment that all street railway companies should maintain and keep in repair such portions of the streets as were occupied by its tracks, and three feet on each side thereof. Section 2 of said act, not

only recognized the validity, but preserved the obligation, of contracts and agreements entered into between the municipality and the corporation in this language:—

> "Section 2. The liability created by this act shall be held to be in lieu of, and a substitute for, all liability now existing in regard to paving by any horse railroad company under *any location or contract,* with any city or town, provided that this act shall not take effect in any city or town where any liability to pave is imposed by any location given, until it has been accepted by such city or town."

Chapter 294 of the Massachusetts Laws of the same year also recognize the right of the corporations and the municipalities to contract, in this language:—

> "Section 1. The supreme judicial court, or any justice thereof, may, upon the petition of the mayor and aldermen of any city, or the selectmen of any town in which any horse railroad is located, issue any injunction or other order upon any horse railroad corporation, or its agents, after having first notified such corporation of the application, and a hearing had thereon, for the purpose of enforcing any laws, lawful rules, regulations, orders or ordinances, relative to such corporation, in a summary manner, and according to the usual course of chancery proceedings: provided, that nothing herein shall abridge or limit the powers now held in relation to such corporations by the municipal authorities of any city or town, nor affect *any contracts or agreements* now existing."

In 1871, the law concerning street railways was codified by chapter 381 of the laws of that year.

Again the Legislature recognized the right to contract with street railway companies by inserting conditions in locations, but here as to a new subject-matter, namely, the rate of fares. For purposes of comparison, ss. 14 and 35 of this Act are printed side by side.

"Sec. 14. The Board of Aldermen of any city, or the Selectmen of any town, in which any corporation is authorized to construct a street railway, may, upon the petition of such corporation, locate the tracks thereof within their respective jurisdictions, pursuant to the provisions of its charter: *provided* that before proceeding to locate such tracks, they shall give notice to all parties interested, by publication in such newspapers, or otherwise, as they may determine, at least fourteen days before their meeting, of the time and place at which they will consider such location. After a hearing of all parties interested, they shall pass an order refusing the location or granting the same, or any portion thereof, *under such restrictions as they deem the interests of the public may require*, and the location thus granted shall be deemed and taken to be the true location of the tracks of the corporation, if its acceptance thereof in writing is filed with said Mayor and Aldermen or Selectmen within thirty days after receiving notice thereof."

Secs. 33 and 34 relate to the establishment of rate of fare by the Directors of the company and by the Railroad Commissioners.

"Sec. 35. Nothing contained in the two preceding sections shall be held to authorize any corporation or said commissioners to raise the rate of fare, or the price of tickets, above what has been heretofore established as such rate or price for any locality, *by agreement* made as a *condition* of *location* or otherwise between a corporation or its directors, and the Mayor and Aldermen of any city or the Selectmen of any town, except by a mutual arrangement with the Mayor and Aldermen or Selectmen with whom such agreement was made."

The law respecting street railways was again codified by chap. 113 of the Massachusetts Public Statutes and once more the Legislature recognizes the validity of agreements and conditions respecting locations in the very act in which they use the word "restrictions." Ss. 7 and 21 which use the word "restrictions" are printed in parallel columns with ss. 43, 44 and 45, which recognize agreements and conditions in locations.

"Sec. 7. The Board of Aldermen of a city or the Selectmen of a town, upon the petition of such directors or a majority thereof for a location of the tracks of the railway therein, shall give notice to all parties interested, by publication in newspapers or otherwise as they may determine, at least fourteen days before their meeting, of the time and place at which they will consider such location and after a hearing they shall pass an order refusing such location, or granting the same or any portion thereof under such restrictions as they deem the interests of the public may require; and the location thus granted shall be deemed and taken to be the true location of the tracks of the railway, if an acceptance thereof by said directors in writing is filed with said Mayor and Aldermen or Selectmen within thirty days after receiving notice thereof."

"Sec. 21. The Board of Aldermen or the Selectmen may, from time to time, under such restrictions as they deem the interests of the public may require, upon petition, authorize a street railway company whose charter has been duly accepted and whose tracks have been located and constructed, or its lessees and assigns, to extend the location of its tracks within their city or town, without entering upon or using the tracks of another street railway company; and such extended location shall be deemed to be the true location of the tracks of the company, if its acceptance thereof in writing is filed in the office of the clerk of the city or town within thirty days after receiving notice thereof. Before acting upon the petition, at least fourteen days' notice of the hearing shall be given to all parties interested, by publication in such newspapers as the Board of Aldermen or selectmen may determine, or otherwise."

"Sec. 43. Every street railway company shall furnish reasonable accommodations for the conveyance of passengers, and for every wilful neglect to provide the same shall forfeit not less than five nor more than twenty dollars; and its directors may establish the rates of fare on all passengers and property conveyed or transported in its cars, subject, however, to the limitations named in its charter, or hereinafter set forth."

"Sec. 44. The Board of Aldermen of a city, the Selectmen of a town, or fifty legal voters of a city or town in which a street railway is located may apply to the Board of Railroad Commissioners, who shall, after due notice and hearing of the parties interested, revise and regulate the fares established by such company; but such fares shall not, without the consent of the company, be so reduced as to yield, with all other profits derived from operating its road, an income of less than ten per cent upon the actual cost of the construction of its road and the purchase of property for its necessary use, to be determined by said board. The report of the board shall be final and conclusive for one year."

"Sec. 45. Nothing contained in the two preceding sections shall be held to authorize a company or said board to raise the rate of fare or the price of tickets above the rate or price established for a locality *by agreement made as a condition of location* or otherwise between a company or its directors and the Mayor and Aldermen of a city or the Selectmen of a town, except by a mutual arrangement with such Mayor and Aldermen or Selectmen."

These successive legislative enactments make it apparent that the Legislature of Massachusetts did not intend to prohibit in grants of extensions of locations the insertion of provisions imposing upon street railway companies either the same obligations or others in addition to those imposed by the general law.

The first general codification of 1864 contains in the same statute, the words "restrictions","terms", and "conditions". The two general amendatory acts of 1866 contain the words "a location orcontract" and "contracts or agreements", and the general codification of 1871 repeats the words "restrictions," "agreements" and "conditions", and the same words are repeated in the Public Statutes of 1882.

As further confirmation of the argument that agreements, outside of what may be technically restrictions, were authorized by the Massachusetts Street Railway Statutes, s. 5, c. 284 of the Massachusetts Laws of 1887 establishing the name of the defendant in error is important, which provides as follows:—

> "Section 5. The said Worcester Consolidated Street Railway Company shall perform all the *stipulations* imposed on the said Citizens' Street Railway Company as a condition on which the location of said railway in the several streets of the city of Worcester was granted by the board of aldermen of said city, within the time as extended by the order of said board of aldermen. In case of the neglect or refusal of said company to perform the said *stipulations* the supreme judicial court or any justice thereof, upon petition of the board of aldermen of the city of Worcester, may by proper decree require said company to perform the same."

Section 11 of chapter 578 of the Laws of 1898 is another legislative confirmation of the validity of conditions theretofore inserted in the street railway locations.

The first clause of said section is as follows: "Street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair, but they shall remain subject to all legal obligations imposed in the original grants of locations." The word "obligations" by its minimum force imports at least a contractual relation. If the legislative interpretation of the word "restrictions" as used in sections 7 and 21 of chapter 113 of the Public Statutes had been as narrow and limited as is contended for by the defendants, the word "obligation" would not have been used in section 11 of the Laws of 1898.

The word "obligation" may have a much higher significance than a mere contractual relation.

Edwards vs. Kearzey, 96 U. S. 595.

The argument of legislative confirmation of the conditions is strengthened by the final sentence of section 13 of the Statutes of 1898, which provides that "all locations heretofore granted . . . are hereby ratified and confirmed, . . . and shall continue in force, subject . . . to all provisions, restrictions, regulations or conditions applying to all street railways under the general law as now enforced, except as changed or modified by this act." If the conditions could not legally be annexed to locations, under chapter 113, there would have been no occasion for the use of the word "conditions" in this sentence.

But two conclusions can be drawn from this continuous and oft repeated use of these words by the Legislature of Massachusetts, either.

(1). That the Legislature regarded the word "restrictions" as comprehending "terms", "conditions", "obligations," "agreements," and "contracts," or,

(2). That it recognized the right of the municipality and the street railway company to enter into con-

tracts and agreements and impose valid conditions in locations respecting all subject matters relating to the construction, maintenance and operation of the street railway company.

The conclusion that the Legislature intended to recognize the right of and authorize the municipality and the street railway company to enter into contracts and agreements, and of the former to impose valid conditions in locations respecting all subject matters relating to the construction, maintenance, and operation of the street railway company is more reasonable and consonant with the meaning of words which were used by the Legislature in these several statutes. It perhaps would not be justifiable to assume that the Legislature intended "restrictions", "terms", "conditions", "contracts", "agreements", or "stipulations" to be used as synonymous terms, when full force and effect can be given to the language by interpreting the words as being used in their ordinary signification.

It is therefore submitted that the Street Railway Law of Massachusetts, at the time the locations in question were granted, authorized contracts between the municipality and the street railway company respecting the general subject matter of street paving. There is not only no prohibition of the making of such contracts to be found in the statutes but on the contrary abundant legislative recognition of such right.

This conclusion receives ample support, with no dissenting note, so far as we have been able to discover, from the decisions of all other courts.

B.

Argument from decisions of other courts.

If from said Section 21, Chapter 113, Massachusetts Public Statutes had been entirely omitted the clause "under such restrictions as they deem the interests of

the public may require," and it had read simply " the board of aldermen may authorize," it is clear under the rule laid down in many cases, that the municipal board might have granted its authority upon such terms, stipulations, restrictions, limitations and conditions as it deemed advisable, to the extent of requiring the performance of such active duties as in its opinion public interests require.

People vs. Barnard, 110 N. Y. 548.

N. Y. & Harlem R. R. Co. vs. City of N. Y., 1 Hilton, 562.

Western Paving & Supply Co. vs. Citizens' R. R. Co. 128 Ind. 525-530.

State vs. Madison St. Ry. Co., 72 Wis. 612.

City of Troy vs. Troy & Lansingburgh R. R. Co., 49 N. Y. 657.

Alleghany vs. Millville etc. St. Ry. Co., 159 Pa. St. 411.

N. Y. & N. H. R. R. Co. vs. N. Y., 4 Beatchford 193.

Citizens St. Ry. Co. vs. City Ry. Co., 64 Fed. Rep. 647.

Detroit vs. Detroit Cy. Co., 37 Mich. 558.

The power to " assent " to the construction of a railroad necessarily involves the right of prescribing terms and conditions under which the authority is to be given.

Northern C. R. Co. vs. Baltimore, 21 Md. 93.

If the legislature had intended to grant to the municipal authorities only the limited power contended for by the defendant in error, it would have been easy to express such limitations clearly and unmistakably, but a grant of location by a municipality is to be strictly construed against the railway company, and such company can claim no doubtful rights under such grants. Wherever doubts exist, they are to be resolved against the grantee, and in favor of the city.

Western Paving & Supply Co. vs. Citizens R. R. Co., 128 Ind. 525-529.

Citizens R. R. Co. vs. Jones, 34 Fed. Rep. 579.

Mayor of Alleghany vs. Ohio R. R. Co., 29 Pa. St. 385.

Birmingham etc., R. R. Co. vs. Birmingham, 79 Ala. 465.

By Section 9, Article 17 of the Constitution (of the State of Pennsylvania) "no street passenger railway shall be constructed within the limits of any city, borough or township without the consent of its local authorities."

It was held that a municipality in granting such consent might impose any reasonable conditions under which the right was to be enjoyed.

Alleghany vs. Millville etc. St. Ry. Co., 159 Pa. St. 411.

Plymouth vs. Chestnut Hill & Norristown Ry. 168 Pa. St. 181.

In Philadelphia vs. Ridge Ave. Passenger R. R. Co., 143 Pa. St. 444, it appeared that the grant of location to the railway company provided that the entire cost and expense of maintaining, paving, repairing and repaving that might be necessary upon any street occupied by the company should be borne by the company. With reference to the validity of this clause under the same constitutional provision above suggested, the court, at Page 466, says "The city had a right to impose that condition upon the corporation before it entered upon the streets and laid its tracks upon them. The act of assembly made the consent of the city to the exercise of that power by the company a prerequisite to the right to use the streets of the city for the purpose of constructing upon them, the streets defined in the act, a city passenger railway, and if the

ctiy had a right to refuse or consent, it had a right to say upon what terms it would consent and upon what terms it would refuse."

A statute of Kansas provided that no street railway should be authorized to construct its road upon any street "without the assent of the proper authorities of such city."

Judge Dillon in giving an opinion construing the effect of these words in

Pacific Railroad Co. vs. Leavenworth, I. Dillon, Circuit Court, 393,

says on page 398 "It has been argued in behalf of the complainant that this statute simply clothes the city with the power to say "yea" or "nay," but that it does not authorize it to stipulate for terms or conditions. But in this view, I cannot concur. Its power is complete; and it was undoubtedly the desire of the legislature that the city authorities, as the representatives and guardians of the public interests of the city and its inhabitants, should have the power to prescribe, as conditions of giving their assent, such lawful and proper terms as they deemed expedient."

A statute of Maryland required that before a railway should be constructed in the streets of Baltimore "the assent of the Mayor and City Council should first be obtained." In commenting upon these words, in Northern Central Railway Company vs. Baltimore, 21 Md. 93, at page 104 the Supreme Court of that state says, "Nothing can be clearer than in such a case the power reserved by the Act to the Mayor and City Council upon the subject is complete and unimpaired and necessarily involves the right of prescribing the terms and conditions upon which their assent is given."

A statute of Georgia required the "consent" of the authorities of the city to the coustruction of a railway

in the streets. It was held in Powell vs. Macon & Newton Springs Railroad Company, 92 Ga. 209, that such consent might properly be accompanied with a condition. See also Detroit vs. Detroit City Railway Company, 37 Michigan 558.

Power to give consent to the building of a street railway has been held impliedly to carry with it power to impose conditions, although no such power is expressly stated in the legislative Act.

See in addition to cases above cited,

Peoples West Side St. Ry. Co. vs. Barnard, 110 N. Y. 548.

Archibald vs. Carbondale Traction Co., 3 Pa. Dist. R. 751.

Abraham vs. Myers, 29 Abbott M. C. 384.

So also the power to assent has been held to confer the power to impose conditions.

Pittsburg etc. Co. vs. Birmingham, 51 Pa. St. 41.

See also

Houston vs. Houston Belt Co., 84 Texas 585.

St. Joseph County Commrs. vs. South Bend etc. Co., 118 Ind. 68.

Kinsman St. Ry. Co. vs. Broadway etc. Co., 36 O. St. 239.

Chicago etc. Co. vs. Dunbar, 100 Ill. 110.

Markey vs. Brooklyn, 35 N. Y. 49.

St. Louis Co. vs. Capps, 72 Ill. 188.

Chicago vs. Chicago etc. Co., 105 Ill. 73.

The defendant in error was granted an extraordinary and a practically exclusive privilege to run cars in the streets described in the extensions of locations. It had no rights in the streets whatever until the local authorities had granted it the location. It has been held that such a privilege may be granted by the municipality upon a payment or bonus for the privilege.

In Newport vs. South Covington & Cincinnati Street Railway Co., 89 Ky. 29, under a statute which provided that the board of councilmen of the city "shall prescribe by ordinance the terms and conditions upon which the public ways of said city may be used or occupied by street railroads," (Sec. 16, c. 306, Acts of Ky. for 1874,) the Supreme Court of Kentucky held that the exaction of a cash payment per car as consideration for permitting the railway to operate, was legal, saying at pp. 33 & 34:

> "The company had no right to enter upon the streets and operate its road save under the franchise granted it by the city. Its consent was necessary, in the absence of express authority from the legislature. The municipality said you may do so, but only upon condition that you pay so much for the privilege."

This decision is in accordance with the tendency of the Supreme Judicial Court of Massachusetts in West Springfield and Agawam St. Ry. Co. vs. Bodurtha, 181 Mass., 586.

Louisville City Ry. Co. vs. Louisville, 4 Bush, 478.

We know of no case which decides or intimates that the condition or restrictions like those inserted in the grants of location at bar were not legal at the time inserted. The Supreme Judicial Court of Massachusetts, in deciding these cases (182 Mass. 49) specifically declined to express any opinion upon the subject. But confident reliance is placed upon Newcomb vs. Norfolk Western Street Railway Company, 179 Mass., 449, as well as upon the general discussion heretofore had that such conditions were valid as restrictions at the time of their grant.

The foregoing discussion has clearly established the two preliminary propositions—

First, that the parties to this suit were competent to make the contract alleged, and

Second, that the subject matter was a proper thing about which to contract.

It remains to inquire whether a contract was actually made, that is to say:

3.

Did the extension of location granted to the defendant in error, when accepted by its written acceptance filed with the City Clerk of the city of Worcester, constitute a contract?

The Supreme Judicial Court of Massachusetts, upon this subject, said simply, . . .

> "It seems to us that the locations, given to street railway companies in public streets by cities and towns in this Commonwealth, do not constitute contracts, or if they do, that they are of such a nature that the legislature can modify or annul them without thereby violating the constitutional provision."
>
> 182 Mass., 47-8.

The questions raised by the writs of error in these cases impose the duty upon this court, however, to ascertain "whether there was a contract, and its import. And this, though it be in a given case the state court has decided that there was no impairment either because the contract had never existed, or because from an interpretation of its provisions, it was found that the obligations which it is asserted were impaired never arose. Houston & T. C. R. Co. vs. Texas, 177 U. S. 66, 77."

> St. Paul Gas Light Co. vs. St. Paul, 181 U. S. 142-147.

In Deposit Bank of Frankfort vs. Frankfort, 191 U. S. 499, at p. 518, the court speaking through Mr. Justice Day quotes with approval the language of Mr. Justice Harlan, delivering the opinion in Douglass vs. Kentucky: 169 U. S. 488, 501, as follows:—

"This court must determine—indeed, it cannot, consistently with its duty, refuse to determine—upon its own responsibility, in each case as it arises whether that which a party seeks to have protected under the contract clause of the Constitution of the United States is a contract, the obligation of which is protected by that instrument against hostile state legislation."

The whole matter, whether there is a contract or not, is opened anew for discussion here, and this court is in no wise bound by what the state court may have said upon the subject.

> "Where the question raised is, whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court under the Constitution of the United States and the acts of Congress relating to writs of error to the judgments of state courts, to inquire and judge for itself with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto."
>
> McGahey vs. Virginia, 135 U. S. 665-667.
> Douglas vs. Kentucky, 168 U. S. 488-501.
> McCullough vs. Virginia, 172 U. S. 102-110.

Four cases have recently been decided by this court, three of them being since the argument of the cases at bar in the Supreme Judicial Court of Massachusetts, which it is respectfully but strenuously contended sustain the proposition that the locations in question, when accepted, constituted contracts. These cases are Detroit v. Citizens Street Railway Company, 184 U. S. 368; Cleveland v. Cleveland City Railway Company, 194 U. S. 517; Cleveland v. Cleveland Electric Railway Company, 194 U. S. 538. City Railway Company v. Citizens St. R. R. Co. 166 U. S. 557.

For purposes of comparison we print in parallel columns the vital provisions of the Massachusetts statute under which the locations in the cases at bar were granted, and the statutes of Michigan, Ohio and Indiana under consideration in the four cases above cited.

Mass. *P.S. ch. 113, §21.*

The Board of Aldermen or the Selectmen may, from time to time, under such restrictions as they deem the interests of the public may require, upon petition, authorize a street railway company whose charter has been duly accepted and whose tracks have been located and constructed, or its lessees and assigns, to extend the location of its tracks within their city or town, without entering upon or using the tracks of another street railway company; such extended location shall be deemed to be the true location of the tracks of the company, if its acceptance thereof in writing is filed in the office of the clerk of the city or town within thirty days after receiving notice thereof.

The Michigan Tramway Act of 1855, as amended by Acts of 1861-67, § 34, reads,

All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned or held by them; provided that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe; provided further, that after such consent shall have been given and accepted by the company or corporations to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the street in such consent or grant named, pursuant to the terms thereof.

Bates Annotated Statutes of Ohio. Revision of 1897.

Sec. 2501. (Terms and conditions of construction and operation to be fixed by council; renewal of grant). No corporation, individual or individuals shall perform any work in the construction of a street railroad until application for leave is made to the council in writing, and the council by ordinance shall have granted permission and prescribed the terms and conditions upon, and the manner in which, the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor; but the council may renew such grant at its expiration upon such conditions as may be considered conducive to the public interest.

* * * *

Sec. 3443. (Council, etc., may fix terms and conditions). Council, or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such [street] railways may be constructed, operated, extended, and consolidated.

Indiana Stats. of 1861.

Sec. 12. "Nothing in this act contained shall be so construed as to take away from the common councils of incorporated cities the exclusive powers now exercised over the streets, highways, alleys, and bridges within the corporate limits of such cities; and all street-railroad companies which may be organized under the provisions of this act shall first obtain the consent of such common council to the location, survey, and construction of any street railroad, through or across the public streets of any city before the construction of the same shall be commenced."

In Detroit vs. Detroit Citizens Street Railway Company, 184 U. S., 368, at pages 384-5, the court, speaking through Mr. Justice Peckham, respecting the force of the language of the Michigan statute above quoted, says:

> "The rate of fare is among the most material and important of the terms and conditions which might be imposed by the city in exchange for its consent to the laying of railroad tracks and the running of cars thereon through its streets. It would be a subject for grave consideration and conference between the parties, and, when determined by mutual agreement, the rate would naturally be regarded as fixed until another rate was adopted by a like agreement. Can it be possible that under this language permitting consent upon such terms and conditions as the city might from time to time prescribe, the power was reserved to make a rate of fare which might ruin the whole enterprise? That a rate once deliberately and mutually agreed upon might be thereafter and from time to time altered at the pleasure of the city alone? Will it be believed the parties thus understood the meaning of that provision? It would hardly be creditable that capitalists about to invest money in what was then a somewhat uncertain venture, while procuring the consent of the city to lay its rails and operate its road through the streets in language which as to the rate of fare amounted to a contract, and gave the company a right to charge a rate then deemed essential for the financial success of the enterprise, would at the same time consent that such rate then agreed upon should be subject to change from time to time by the sole decision of the common council. It would rather seem that the language above used did not and was not intended to give the right to the common council to change at its pleasure from time to time those important and fundamental rights affecting the very existence and financial success of the company in the operation of its road, but that by

> the use of such language there was simply reserved to the city council the right from time to time to add to or alter those general regulations or rules for the proper, safe, and efficient running of the cars, the character of service, the speed and number of cars, and their hours of operation and matters of a like nature, such as are described in the opinion of the court below in this case. Such would seem to be a reasonable construction of the language."

The decision proceeds to a conclusion, however, by resting upon the terms of §§20-29 of the street railway act set out in the margin of said report, which were held to expressly authorize an agreement relating to a rate of fare.

If the provision in the Detroit ordinance had been that the street railway company should be required to pave that portion of streets between the tracks in which its tracks were laid, by parity of reasoning the court must have held this provision also to be a contract that the company should not in the future be required to pave a larger part of the street. Can it be any less a contract when the obligation is that it shall pave the entire street between the curbs? Is not the language of the court in the Detroit case equally apt when applied to a requirement made of and assumed by the street railway company for the benefit of the municipality?

Respecting the power of the municipal authorities of the city of Cleveland to impose a condition as to rates of fare under the provisions of the statutes quoted, this court, speaking through Mr. Justice White, says, in Cleveland vs. Cleveland City Railway Co., 194 U. S. 517, on page 534:—

> "The statutes show that there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms

and conditions upon which such roads might be constructed, operated, extended, and consolidated, the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed."

Then after referring to Cincinnati & S. R. Co. vs. Carthage, 36 Ohio St. 631, 634, and Columbus v. Columbus Street Ry. Co., 45 Ohio St. 98, as being decisions of the Ohio court that the grant created a binding contract, the court proceeds to consider the question upon principle apart from authority and without treating the Ohio decisions as decisive, and reaches the result, upon page 536, that, . . .

"In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter; that by those ordinances existing rights of the corporation were surrendered, benefits were conferred upon the public and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties, definitely fixing the rates of fare which might be thereafter charged. Taking all the circumstances above referred to into account, the case before us clearly falls within the rule as to the binding character of agreements respecting rates applied in Detroit v. Detroit Citizens' Street R. Co., 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410, and approvingly referred to in Knoxville Water Co. v. Knoxville, 189 U. S. 437, 47 L. ed. 891, 23 Sup. Ct. Rep. 531."

In City Railway Company v. Citizens' Street Railroad Company, 166 U. S. page 557, in passing upon an

ordinance granted under the above quoted §122, Indiana statute, granting the appellee a right to construct a street railway in certain streets in Indianapolis, the court speaking through Mr. Justice Brown, at page 563, says,—

> "That the complainant had a contract with the city is entirely clear. It was so held by the supreme court of Indiana in Western Paving & S. Co. v. Citizens' Street R. Co., 128 Ind. 525 (10 L. R. A. 770), in which the liability of the company for certain street improvements was discussed and passed upon. It is true that, by §11 of the original act of 1861, a right was reserved to the general assembly to amend or repeal at their discretion the act authorizing the incorporation of street-railway companies; but that was a right reserved to the general assembly itself and was never delegated, if in fact it could be delegated, to the common council of the city."

The decisive words in the several statutes construed in these cases, action under all of which has been uniformly held to constitute contracts are, if anything, less comprehensive in their grants of power to the municipal authorities than is the Massachusetts Statute. The Massachusetts Statute "authorizes" street railway construction under "restrictions" and requires "acceptance" by the company. The Michigan Statute requires "consent" under "regulation" and "upon terms and conditions." The Ohio Statute requires a "grant of permission" and the prescribing "of terms and conditions." The Indiana Statute requires "consent."

It is to be observed that the Massachusetts Statute is the only one which requires an acceptance on the part of the company, which acceptance is to be filed with the City Clerk.

The construction contended for by the defendant in error requires this Court to determine that instrument to

be not a contract in Massachusetts, which it has held in the three States above mentioned to be contracts, and this with reference to a subject-matter where the jurisdiction of this Court is original, to determine whether a contract exists or not, quite unfettered by any decision of any of the State Courts.

The petitions of the defendant in error for the extensions of locations, in which so-called conditions appear, were voluntary petitions. There was no compulsion resting upon the defendant in error to accept locations, and there was no provision of law compelling extensions. The granting of the extension of location to the defendant in error by the local authorities of Worcester, was wholly discretionary and optional. The act of the defendant in error, therefore, was entirely voluntary, and any agreement or condition made or accepted by the defendant in error, it should be held to perform.

West Springfield & Agawam St. Ry. Co. vs. Bodurtha: 181 Mass. 583.

A

The right to contract as to laying out highways recognized.

The statutes of Massachusetts authorize the laying-out and widening of highways, only on the ground that "common convenience and necessity requires" it. As preliminary to the right of the public ways, there must be an adjudication that such action is required by "common convenience and necessity," and until the public board acting judicially makes this preliminary adjudication, there can be no legal lay-out.

Mass. Rev. Laws, c. 48, ss. 1 and 5.

No right exists on the part of public officers to lay out ways "colorably for the use of the inhabitants, but really for the benefit of private land owners," "over lands of others who are opposed to the way."

Commonwealth vs. Cambridge: 7 Mass. 156, 167.

Yet it has been repeatedly held by the Supreme Judicial Court of Massachusetts that valid agreements might be made with the board laying out the way, such agreements often taking the form of propositions to make pecuniary compensation to the town, in the event such lay-out is made. Proffers of that nature can have no other intent or effect than to influence the public board toward making the judicial adjudication as to what "common convenience and necessity may require." Nevertheless, such propositions when acted upon have uniformly been held to be binding contracts.

Parks vs. Boston, 8 Pick. 218.
Crockett vs. Boston, 5 Cush. 182.
Arlington vs. Cutter, 114 Mass. 344.
Bell vs. Boston, 101 Mass. 506.
Melrose vs. Hiland, 163 Mass. 303, 311.

With reference to a grant of a location to a street railway company, however, there was no provision to be found in the Massachusetts Statutes, which required any consideration of public necessity and convenience as to the granting of a location, but only as to the imposition of restrictions. The local authorities had full power to grant the location to any company who desired it, quite regardless of any adjudication that "the public necessity and convenience required" such grant of location. The only burden upon the local authorities in granting a location was to impose such "restrictions" as they deemed the interests of the public to require. If, however, propositions, agreements and contracts with reference to public work, which in the first instance, quite apart from the matter of expense, requires an adjudication that "common convenience and necessity requires" the work to be done, are valid, as the foregoing cases demonstrate, *a fortiore* are agreements with reference to the location of street railways valid and binding.

The question of whether such locations constitute a contract between the city and the street railway company was left open in Cambridge vs. Cambridge R. R. Company, 10 Allen, 50, at page 58. The objections against maintaining the petition stated in the opinion of the Supreme Judicial Court of Massachusetts in that case were to a great extent obviated by §63, Ch. 113, of Mass. Public Statutes (§1, Ch. 294, Mass. Laws of 1866, and §57, Ch. 381, Mass. Laws of 1871) enacted after that case was decided. This statute conferred upon the Supreme Judicial Court jurisdiction in equity to deal with the whole subject matter of street railway locations and obligations arising therefrom.

B

Other Federal and State decisions.

There is a great weight of authority in the State and federal courts that the granting of a location and its acceptance constitutes a valid contract between the city and street railway company.

Des Moines St. Ry. Co. vs. Des Moines B-G St. Ry. Co., 73 Iowa, 513; S. C., 74 Iowa, 585.

In all essential respects, the case at bar is exactly parallel to

Coast Line Co. vs. Savannah, 30 Fed. Rep. 646.

There the provision in the ordinance granting the right to the railroad company to lay the rails was in the following language:

> "In the event of the paving by the city of the whole or any portion of the streets used by said railroad company, the portion of the track between the rails shall be paved and kept in good order and thorough repair by the company, at its own expense and cost."

Upon the question whether this was a contract, the Court says upon pages 648 and 649 as follows:

> "That the ordinance of the city, authorizing the construction of the railroad, is a contract between the two corporations, in the opinion of the court, is scarcely susceptible of doubt. Had permission

been given by the city simply to build the road, without consideration, and had the company in good faith built it accordingly, it would have been a contract, more properly perhaps a grant, which in legal effect, Mr. Justice Blackstone tells us, 'differs in nothing from a contract.' A grant in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is always estopped by his own grant."

In New York vs. Eighth Avenue R. R. Co., 43 Hun., 614, it appeared that an agreement was made with the city by which authority was given to construct the railroad in certain streets, one of the terms upon which the authority was granted being that there should annually be paid to the city for each car a certain license fee. It was contended that a subsequent act of the legislature has worked an abrogation of this agreement. With reference to this contention, the Court, on page 619 says,

"But if the act by any possibility could be so construed as to supersede the liability of the company to pay the license fees, it would be inoperative, for it had become liable to make such payments by the contract under which it acquired the right to construct and operate the principal part and residue of its road, and over which its cars have been and are drawn and operated. It was one of the stipulations entered into and inducing this concession, and from the time of its confirmation and ratification by the act of 1854, it has clearly been binding and effectual upon the railroad company. And after having become so, the legislature was prevented by sub-division 1 of Section 10 of Article 1 of the Constitution of the United States which prohibits the states from passing any law impairing the obligation of a contract from relieving the company of the obligation to perform this part of the contract."

A further confirmation of the contention that an extension of location for a street railway company is a

contract, is the provision of sec. 21 of chap. 113 of the Public Statutes, requiring that there be an "acceptance in writing," "filed in the office of the clerk of the city or town within thirty days after receiving notice" of the granting of the extension. This smacks of contract. The requirement is that such acceptance be filed with the city clerk, who is the official custodian of the valuable paper and contracts of the municipality. No such statutory mandate exists as to locations for electric telephone and telegraph poles; sec 3, chap. 109 of Public Statutes; or as to electric light poles; chap 221, Laws of 1883; or as to companies for the transmission of intelligence by telephone; chap. 434, Laws of 1889; or as to locations for gas pipes; sec. 75, chap. 106, Public Statutes; or as to private steam railroads crossing streets; sec. 224, chap. 112 of Public Statutes. This requirement of filing of acceptance gains added strength for the argument that it is a contract from the fact that the city clerk, a representative of the corporate entity, is the officer to receive the acceptance, rather than the Aldermen or the clerk of the Aldermen.

It has often been held that acceptance by a railroad company of a location which is a mere license to lay tracks in city streets upon certain terms and conditions contained in the license becomes a contract between the parties.

Troy v. Troy & L. R. Co., 49 N. Y. 657.

Indianapolis C. R. Co. v. Lawrenceburg, 34 Ind 304.

To the point that the acceptance of a location constitutes a contract:

Chicago v. Sheldon, 9 Wall., 50

Des Moines City St. R. Co. v. Des Moines, 90 Iowa, 770.

State v. Corrigan Con. St. Ry. Co., 85 Mo. 263-278.

Springfield Ry. Co. v. Springfield, 85 Mo. 674-677.

Kansas v. Corrigan, 86 Mo., 67-70.

People v. O'Brien, 111 N. Y., 1-52.

Citizens St. Ry. Co. v. Memphis, 53 Fed. Rep., 715-732.

Baltimore Trust Co. v. Baltimore, 64 Fed. Rep., 153.

Africa v. Knoxville, 70 Fed. Rep., 728-734.

Birmingham & Pratt Mines St. Ry. Co. v. Birmingham St. Ry. Co., 79 Ala., 465.

Chicago & Western Indiana R. R. Co. v. Chicago, St. Louis & Pittsburg R. R. Co., et al, 15 Ill., App. 587.

Wright v. Milwaukee Electric Rlwy. & Light Co., 95 Wis., 29-35

City of Belleville v. Citizens Horse Rlwy. Co., 152 Ill., 171.

Harvey v. Aurora & Geneva Rlwy. Co. 186 Ill., 283-293.

Houston v. Houston St. Rlwy. Co., 83 Texas, 548.

Rutland Co. vs. Marble Co., 65 Vt., 377-381.

City Ry. Co. v. Citizens' R. R. Co., 166 U. S. 557 S. C. 65 Fed. Rep., 746 and 64 Fed. Rep. 647.

Alleghany v. Millville Co., 159 Pa. St. 411.

Arcata v. Arcata R. R. Co., 92 Cal., 639.

Brooklyn Central R Co. v. Brooklyn City R. Co., 32 Barb. 358.

Indianola v. Gulf W. T. & P. R. Co., 56 Texas, 594.

Cincinnati R. R. v. Carthage, 36 O. St., 631.

Pittsburg, &c., Ry. Co. v. Birmingham, 51 Pa-St., 41.

State v. N. Orleans City, 43 La. An., 550.

N. Y. & N. H. R. R. v. New York, 4 Blatchford, 193.

Detroit v. Detroit City Ry. Co., 37 Mich., 558.

Hovelman v. Kansas City Horse Ry. Co., 79 Mo., 632.

Mercantile Tr. & Dep. Co. vs. Collins Park & B. R. Co., 101 Fed. Rep. 347 at 350.

City of Lansing vs. Lansing City Electric Ry. Co., 66 N. W., 949 (Mich).

In Indianapolis and Cincinnati R. R. Co. vs. Lawrenceburg, 34 Ind., 304, the grant of the right to construct the railroad contained a provision that the company should fill in all streets enough to make a convenient passage over the tracks. The company, after accepting the right and constructing its road, declined to do the filling. The city performed the work and brought suit to recover the expense. It was held that the city could maintain the action, the Court saying on page 307,—

> "There can be no doubt that as the railroad company accepted the ordinance of the city and built a railroad through the city by virtue thereof it was bound to comply with the terms and conditions specified in the ordinance."

To the same point is the language of the court in New Orleans v. Great Southern Telephone & Telegraph Company, 40 La. Ann., 45, quoted with approval by Mr. Justice Brewer in City of St. Louis vs. Western Union Telegraph Company, 148 U. S, 92-103, as follows:

> "Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous conditions therein. Such has been the well-recognized doctrine of the authorities since The Dartmouth College Case, 4 Wheat., 518."

C

Contract was with City of Worcester.

If it be said that the grant of location to the defendant in error was made by the Board of Aldermen not representing the municipality, but as a board of public officers, and that therefore the contract is not with the plaintiff in error, the answers to the proposition are several:

a. The Supreme Judicial Court of Massachusetts, in its opinion respecting this very matter, treats the location as granted by the city or town, when it says (182 Mass., p. 48),

> " It seems to us that the locations given to street railway companies in public streets *by cities and towns* in this Commonwealth," etc.

b. The Board of Aldermen in the Massachusetts statute is as much a municipal authority and no more public officers than the Boards under discussion in City Ry. Co. vs. Citizens' St. R. Company, 166 U. S., 557, Cleveland vs. Cleveland City Railway Company, 194 U. S., 517, and Detroit vs. Detroit Citizens' Railway Company, 184 U. S., 368.

c. If the Board of Aldermen in granting the location acted as a board of public officers (Cambridge vs. Cambridge R. Company, 10 Allen, 50, Underwood vs. Worcester, 177 Mass., 173) they also acted in a dual capacity, having a right to represent and representing for this purpose the municipality itself, so far as it had a property interest to be subserved.

The general duty was imposed upon the city of Worcester to care for the public streets of the city and to keep them in repair at the time the location was granted, --- which duty has been continued ever since.

Mass. P. S., ch. 52, §1.

Mass. Rev. Laws, ch. 51, §1.

With reference to the subject-matter of repairs of streets, and the surface material of streets, therefore, the city of Worcester had a property interest both by reason of the statutory obligation imposed upon it, with the penalties for failure to perform them (§23, ch. 51, Mass. Rev. Laws) and also by reason of the statutory liability imposed upon towns for injuries received by defects in such ways (§18, ch. 51, Mass. Rev. Laws.)

Butman vs. Newton, 179 Mass., 1.

Its pecuniary interest in this subject-matter is so great as to make it legal for the municipality to fail to follow the path pointed out by the statute for care and repair of its streets and ways, in leaving the subject to road commissioners, highway surveyors or street commissioners, and undertaking through its own agencies to care for the repairs of streets. When acting through such special agents it is responsible in the same way that private corporations are responsible for the neglect or misfeasance of their agents.

Collins vs. Greenfield, 172 Mass., 78-81.
Brookfield vs. Reed, 152 Mass., 568.
Pratt vs. Weymouth, 147 Mass., 245-254.
Deane vs. Randolph, 132 Mass., 475.
Hawks vs. Charlemont, 107 Mass., 414.
Perry vs. Worcester, 6 Gray, 544.

If therefore, the Board of Aldermen in granting the location undertook to prescribe conditions as to repair of streets, these conditions related to a subject-matter about which the city had the right to make a contract, and as to which in its municipal capacity it had a deep pecuniary interest well recognized by a long line of decisions of the Massachusetts Supreme Court.

Tindley vs. Salem, 137 Mass., 171.

d. Indeed, it has been intimated by the Supreme Judicial Court of Massachusetts, respecting the grant-

ing of locations to street railway companies, that the municipality in its private capacity has a corporate interest in the subject-matter of keeping its streets in repair.

Flood vs. Leahy, 183 Mass., 232-6.

e. By a line of decisions, it has been held by the Supreme Judicial Court of Massachusetts that propositions made to the Board of Aldermen or Selectmen or agreements made with them, respecting the laying-out, widening or constructing of a street, and as to damages occasioned thereby, is in effect, when acted upon, an agreement by the municipality itself.

Parks vs. Boston, 8 Pick., 218.
Crockett vs. Boston, 5 Cush., 182.
Arlington vs. Cutter, 114 Mass., 344.
Bell vs. Boston, 101 Mass., 506.

"The agreement was for the benefit of the town, and the bringing of the action upon it is sufficient evidence of an acceptance of it, and of a ratification of the act of the selectmen in taking it."

Melrose vs. Hiland, 163 Mass., 303, 311.

D.

Is the defendant estopped to deny the contractual legality of the conditions sought to be enforced?

The situation existing between the City of Worcester and the defendant at the time of the grant of the locations containing these conditions presents every element necessary to make out legal estoppel. The railway company petitioned the Board of Aldermen for a location. That petition was granted, and the location was duly accepted in writing by said Board of Directors of

said Worcester Consolidated Street Railway Company, all as required by law, and said acceptance was by said respondent company filed with the City Clerk of the City of Worcester, as alleged in paragraph four of the bill. The location as granted was a fair and unequivocal statement of what would be required of the street railway company. By the act of the defendant in accepting the location without indicating either by word or act its intention to contest at any time the validity of any of the conditions annexed to the location, it induced the Board of Aldermen to believe that it intended in good faith to comply with these conditions.

City Ry. Co. vs. Citizens' Ry. Co., 166 U. S., 557-566.

Columbus vs. Columbus St. Ry. Co., 45 Ohio St., 98.

Brooklyn Central R. R. Co. vs. Brooklyn St. Ry., 32 Barb., 358.

"The ordinance, the acceptance thereof and the enjoyment of the benefits of its provisions by the respondent company, must be regarded as establishing, so far as the respondent company is concerned, and as estopping it to deny, the validity of the conditions imposed."

People vs. Suburban Railroad Co., 178 Ill. 494, 594, at 606.

The street railway company has no right to demand and receive locations coupled with conditions, the granting of which is not by right to the railroad company, but by grace, and avail itself of the benefits derived from such location without bearing its burdens.

State vs. Stone, 118 Mo. 388.

The plainest dictates of fairness demanded of the street railway company that before filing its acceptance it should indicate to the Board of Aldermen if it intended to contest any of the conditions annexed to the

location. The Board of Aldermen could then have been forewarned of the attitude of the street railway company, and modified the restrictions or taken other steps to protect itself before the location had been finally acted upon. The failure to indicate such intention by the street railway company has given "a right arising from acts, admissions or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged."

Bigelow on Estoppel, 4th Ed. 445.

Of course the duration of the contract was limited by the term of the defendant in error's location in the street. This was liable, prior to 1898 and at the time of the granting of the extensions of location in question, to be revoked at any time by order of the board of aldermen under the provisions of s. 23, c. 113 of the Massachusetts Public Statutes, which was as follows:—

> "Sect. 23. The board of aldermen or the selectmen, at any time after the expiration of one year from the opening for use of a street railway in their city or town and after notice published as provided in section twenty-one and a hearing, if in their judgment the interests of the public so require, may order that the location of any track shall be revoked; and the company shall thereupon remove the same in conformity with such order, and shall put the street in as good condition as it was in immediately before being occupied by said track."

II.

WHAT OBLIGATIONS AROSE FROM THE CONTRACT?

The foregoing discussion and particularly the cases in this court of Cleveland vs. Cleveland City Railway Co., 194 U. S., 517; City Railway Company vs. Citizens' R. R. Co., 194 U. S., 557; Detroit vs. Detroit Citizens' St. Ry. Co.. 184 U. S., 592; have established clearly that such contracts, so far as the public service corporation is concerned, are inviolable and cannot without its consent be modified or changed.

The only matter to be considered, then, under this branch of the discussion is whether a municipal corporation is entitled to the same constitutional protection and immunity from legislative interference that is enjoyed by the public service corporation. The determination of this inquiry involves an investigation into the nature and extent of rights possessed by the plaintiff in error as a municipal corporation.

A

Contracts of a Municipality inviolable.

It will doubtless be the contention of the defendant in error that the state has the paramount control of streets; that the obligation to repair them heretofore has been merely for the convenience of administration vested in the municipality; and that at any time the state has a right to resume its supremacy of control over the subject matter of streets. However this may be as an abstract proposition, it is not the situation which confronts us. It may be conceded that the state might, as to the whole of Massachussetts or as to any part of it, assume entire control of streets. But what the legislation in question undertakes to do is to continue to impose the burden of responsibility for repair of streets wholly upon the municipality, and at the same time, to destroy the obligation of all contracts it had

made with street railway companies to relieve it of the whole or any part of that burden. The federal constitution protects contracts of this nature from such legislative assaults.

The contracts in question relate to the performance of a public duty, namely, the maintenance and repair of streets. The obligation resting upon the plaintiff in error, as set out in s. 1, c. 51 of the Massachusetts Revised Laws is as follows:

> "Highways, town ways, causeways and bridges shall, unless otherwise provided, be kept in repair at the expense of the city or town in which they are situated, so that they may be reasonably safe and convenient for travelers, with their horses, teams and carriages at all seasons."

This duty is a public duty, but so long as it rests upon the cities and towns, it is a subject about which they may contract and assume liabilities and subject others to contractual liabilities in the same manner and to the same extent as if it were a private corporation in the performance of a private duty. This at least is the effect of Massachusetts decisions with reference to the rights and liabilities of municipal corporations over streets and ways.

It can make contracts with reference to the laying-out and widening of streets, which are recognized as legal and enforceable.

> Arlington vs. Cutter, 114 Mass., 344, and cases cited.
>
> Atkinson vs. Newton, 169 Mass., 242.
>
> Townsend vs. Hoyle, 20 Conn., 1.

It can make contracts with reference to the perpetual repair of streets and highways.

> Brookfield vs. Reed, 152 Mass., 568.

It may well be that the words "unless otherwise provided" in said sec. 1, c. 51, Mass. R. L. have reference to this recognized right of contract.

It can also so contract with reference to the repair of highways as to become personally responsible and thereby relieve itself of the immunity which otherwise would attach to public work.

Butman vs. Newton, 179 Mass., 1.

It could also unquestionably receive legacies and gifts for the purpose of repairing its highways.

Dillon, 4th Ed., sec. 596.

These rights which it has acquired with reference to its duty, the city holds not in its public capacity as a branch of the sovereign power and subject to the unrestricted control of the legislative power, but it holds them as a corporate individual, having rights of its own, respecting the duties which it is required to perform, and which it is at liberty to enjoy undisturbed by any agency of the State itself and in the enjoyment of which it is entitled to the protection of the Federal constitution.

Detroit vs. Park Commissioners, 44 Mich, 602, 604.

In sect. 68 of Volume I, Dillon on Municipal Corporations, 4th ed., the author states that "The weight of opinion seems to be in favor of the doctrine that there may be, in such corporations, rights under contracts and grants which are beyond destruction by the legislature."

In support of this proposition are cited:—

Richland County v. Lawrence County, 12 Ill. 1.

Montpelier v. East Montpelier, 29 Vt. 12. S. C. 27 Vt. 704.

Pawlet vs. Clark, 9 Cranch 292, 336.

Terret v. Taylor, 9 Cranch 43, 52.

Mr. Justice Story in Dartmouth College case, 4 Wheat. 518, 663.

In Grogan vs. San Francisco, 18 Cal. 590, Mr Chief Justice Field asserted that:—

"Nor is there any difference in the inviolability of the contract between a grant of property to an individual and a like grant to a municipal corporation. So far as municipal corporations are invested with subordinate legislative powers for local purposes, they are mere instrumentalities of the State for the convenient administration of the Government, and their powers are under the entire control of the Legislature; they may be qualified, enlarged, restricted, or withdrawn at its discretion. But these bodies, says Kent, 'may also be empowered to take and hold private property for municipal uses, and such property is invested with the security of other private rights.' (1 Com. 3 vol. 275.) 'It may also be admitted,' observes Mr. Justice Story, in his opinion in the case of The Trustees of Dartmouth College v. Woodward. 'that corporations for mere public government, such as towns, cities, and counties, may in many respects be subject to legislative control. But it will hardly be contended that, even in respect to such corporations, the legislative power is so transcendent that it may, at its will, take away the private property of the corporation or change the uses of its private funds acquired under the public faith.' (4 Wheat. 694.) 'The inhabitants of the City of New York,' says the Supreme Court of New York, 'have a vested right in the city hall, markets, water-works, ferries, and other public property, which cannot be taken from them any more than their individual dwellings or storehouses. Their rights, in this respect, rest not merely upon the Constitution, but upon the great principles of eternal justice, which lie at the foundation of all free governments.' (Benson vs. the Mayor of New York, 10 Barb. 245.) The authorities are all to the same purport. A legislative grant is an executed contract, and as such is within the clause of the Constitution of the United States which prohibits the States from passing any law impairing the obligation of contracts. This was expressly decided by the Supreme Court of

the United States in Fletcher vs. Peck, 6 Cranch. 137. It cannot therefore be destroyed, and the estate be divested by any subsequent legislative enactment. And though a municipal corporation is the creature of the Legislature, yet when the State enters into a contract with it, the subordinate relation ceases, and that equality arises which exists between all contracting parties. And however great the control of the Legislature over the corporation, it can be exercised only in subordination to the principle which secures the inviolability of contracts."

See also,

People v. O'Brien, 111 N. Y. 1.

At the end of the same section 68, Mr. Dillon summarizes his conclusions as follows: — "It is believed by the author * * * that while the legislature has full power of legitimate regulation and control, it cannot deprive them, (that is, in essence, the people of the locality at whose expense it has been acquired, or for whose benefit it was granted) of such property. It is in effect fastened with a trust for the incorporated municipality as long as the legislature suffers it to live, and for the benefit of the people of the locality, if the corporate entity which represents their rights shall be dissolved."

The rule is thus stated in the 7th Edition of Cooley's Constitutional Limitations at page 344: —

"The rule upon the subject we take to be this: when corporate powers are conferred, there is an implied compact between the State and the corporators that the property which they are given the capacity to acquire for corporate purposes under their charter shall not be taken from them and appropriated to other uses."

People v. Batchellor, 53 N. Y., 128.
People v. Chicago, 51 Ill., 17.

People v. Tappan, 29 Wis., 664.
People v. Hurlbut, 24 Mich., 44.
Hewison v. New Haven, 37 Conn., 475.
New Orleans & c. R. R. Co. v. New Orleans 26 La. An., 517.

The fundamental question is not whether the Legislature can enact primary responsibility with reference to repairs of highways to rest wholly upon the city, but whether it can deprive the city of the right it has obtained to reimburse itself respecting repairs in portions of the public way. For instance, it probably could not be successfully contended that the Legislature did not have a right to repeal s. 32, c. 113 of the Massachusetts Public Statutes, which put the compulsory duty upon street railways to maintain in repair a portion of the surface material of streets occupied by its tracks. The attempt, however, to sweep away contract obligations which the city has acquired with reference to the repair of streets involves a very different conception of legislative powers. It might as well be contended that a legacy or gift made by a private individual to the City of Worcester for the purpose of keeping Green and Millbury Streets in repair could by act of the Legislature be diverted to other uses or transferred to the street railway company.

As was said in Detroit vs. Detroit & Howell Plank Rd. Co., 43 Mich. 140-148:—

> "In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired; whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the State. It is enough that it has become private property, and it is then protected by the 'law of the land.' Even municipal

corporations, though their charters are in no sense contracts, are protected by the Constitution in the property they rightfully acquired for local purposes, and the State cannot despoil them of it. Terrett vs. Taylor, 9 Cr. 43; Pawlet vs. Clark, 9 Cr. 292; State vs. Haben, 22 Wis. 660; People vs. Common Council, 28 Mich. 228."

Contract rights stand at least upon as strong ground as would money raised by general taxation. Even in the exercise of the taxing power, the Legislature has no right to issue its mandate to a municipality that it shall contribute its monies raised from taxation toward the construction of a railroad or other public service corporation.

People vs. Batchellor, 53 N. Y. 128, 138-142.

It cannot be successfully contended that the authority possessed by the Legislature to determine either by its general law or by its special act of incorporation, what shall be the extent of the capacity of a city to acquire and hold property, is equivalent to or contains within itself the authority to take away from the city property it has actually acquired in any legitimate way. As to property it has thus acquired, either for lightening the burdens of taxation or for extension of other public benefits to its inhabitants, and whether such property rights be acquired by gift or by contract, the municipality is entitled to the like protection as any natural person within the state.

As it is one of the principles of every free government that "it is not in the power of the Legislature to create a debt from one person to another or from one corporation to another, without the consent, expressed or implied, of the party charged," so also it is beyond the legislative power to wipe out a valid debt subsisting from one person or corporation to another person or corporation, without the assent of the creditor.

Co. of Hampshire vs. Co. of Franklin, 16 Mass., 76.

Bd. of Park Com. vs. Detroit, 28 Mich. 228-240.

"The constitutional principle that no person shall be deprived of property without due process of law, applies to artificial persons as well as natural, and to municipal corporations in their private capacity, as well as to corporations for manufacturing and commercial purposes. And when a local convenience or need is to be supplied in which the people of the state at large, or any portion outside the city limits, are not concerned, the state can no more by a process of taxation take from the individual citizens the money to purchase it, than they could, if it had been procured, appropriate it to said use. To this extent the corporate right appears to us to be a clear and undoubted exception to the general power of control which is vested in the state."

Of the cases that may be cited in support of the proposition, that the contract in question does not rise to the dignity of being under the protection of the Federal Constitution; Essex Public Road Board vs. Skinkel: 140 U. S., 334, was a case relating purely to taxation. New Orleans vs. New Orleans Water Co.: 142 U. S., 79, related to the interpretation of a statute passed by the Legislature, which it was contended created of itself a contract. It was held that 1st, there was no contract; 2nd, the city had repudiated it, and 3rd, that it being an act of the Legislature relating to a municipality, the Legislature itself might change it. C. B. & Q. R. R. Co. vs. Nebraska: 170 U. S. 57, was decided upon the exercise of police power. Brown vs. Turner: 176 Mass., 9, passed upon special legislation relating to the Boston subway. Laramie vs. Albany: 92 U. S., 307, related solely to the legislative power to divide towns.

In the case at bar, the city had acquired by its contract, an obligation running from the defendant in error to it, to keep in repair certain portions of certain streets It is no more within the power of the Legislature to change, alter or rescind this contract than if such contract had been made with a private individual. If the city had made a contract with a paving company to furnish a certain number of paving blocks each year, it would hardly be contended that the Legislature might intervene and, by its enactment, provide that the defendant in error should receive the benefit of that contract, nor could it be successfully contended that the Legislature might relieve such paving company of such obligation to comply with the terms of the contract without the assent of the city. Courts should guard the contractual rights of municipalities with as jealous care as those of private individuals.

Suppose the City of Worcester had located a schoolhouse upon a certain lot, at the same time taking an agreement from an adjoining land owner that, if the schoolhouse should be located there, the land owner would, for a period fifty years, paint the schoolhouse; could the legislature relieve the land owner of the obligation to perform this contract? Yet the providing of schoolhouses is no more and no less a function of sovereignty in Massachusetts than the repair of streets.

B

Excise Tax no substitute for Contracts.

It may be claimed that the legislature has, in this instance, substituted an execise tax for the contract obligations, and that this is sufficient to remunerate the municipality for contract obligations with street railways. It can make no difference with the principle involved whether the legislature has furnished a sub-

stitute or not. The character and value of the substitute can be changed at will by a legislature which meets annually. The fundamental objection is that the legislature has no right to meddle with the contract without the assent of the municipality.

But, in fact, the legislature has made no substitution, and has attempted to make no substitution, for the greater part of the obligations contained in the contracts which are the subject matter of this litigation.

S. 7 of said c. 578, provides an arbitrary excise tax equal to such proportion of the percentages of the gross receipts of the company therein stated, as the length of the tracks operated by it in public ways of such city or town bears to the total length of track operated by it in public ways. This is a purely arbitrary tax. It is not based, and does not by its terms, profess to be based, upon the expense of the municipality it caring for its ways. S. 8, however, furnishes the basis upon which the permanent excise tax is to be computed. That basis is only such a payment as will yield to the municipality an amount equal to the cost of work of repairing streets, which, under the provisions of said c. 578, the municipality is required to do, and which by law it was not previously required to do. So that the legislature did not intend to make an excise tax which should be a fair equivalent, or in any sense an equivalent, for the contractual obligations which the city may have secured from the street railway companies as to the repair of streets.

III

IS THERE PROPERTY OR A PROPERTY RIGHT WHICH HAS BEEN TAKEN AWAY FROM ANY PERSON WITHOUT DUE PROCESS OF LAW?

I

As to property.

Mr. Justice Bradley, in Campbell vs. Holt, 115 U. S. 620, in defining what property and property rights may be, says:—

> "That clause of the amendment which declares that 'no State shall deprive any person of life, liberty or property without due process of law,' was intended to protect every valuable right which a man has. The words life, liberty and property are constitutional terms, and are to be taken in their broadest sense. They indicate the three great subdivisions of all civil right. The term 'property,' in this clause, embraces all valuable interests which a man may possess outside of himself, that is to say, outside of his life and liberty. It is not confined to mere tangible property, but extends to every species of vested right. . . . In my judgment, it would be a very narrow and technical construction to hold otherwise. In an advanced civilization like ours, a very large proportion of the property of individuals is not visible and tangible, but consists in rights and claims against others, or against the government itself."

The question then, upon this branch of the case, is:—

Do the obligations to pave and maintain paving contained in the conditions of grants of locations referred to in the pleadings of the plaintiff in error, when accepted in writing by the defendant by its acceptance filed with the City Clerk of the city of Worcester, constitute property and property rights in the city of Worcester,

of which it is deprived by c. 578 of the Massachusetts Laws of 1898, without due process of law.

If it be assumed that the obligations to pave described in the pleadings of the plaintiff in error were not contracts, they are at least restrictions. This may be assumed to be established by the foregoing discussion, under the first branch of this argument respecting the contract nature of the locations.

A

Restrictions constitute valuable property rights.

They are comprehended within the language of Chief Justice Marshall in Soulard vs. United States, 4 Pet., 511, wherein at p. 512 he says:—

"The term 'property,' as applied to lands, comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in contract—those which are executory as well as those which are executed. In its broadest sense, the word property includes all rights and interests in real and personal property, and also any easements, franchises and incorporeal hereditaments."

Metropolitan City Ry. Co. vs. Chicago, 87 Ill., 317.

Building restrictions are a common illustration of property rights of restrictions which are often of very high value. The right of a residential land owner to enforce a restriction that buildings upon some street shall not be erected nearer than a specified distance to the street line enhances appreciably property values and becomes a valuable species of property right. The same is also true of restrictions as to height of buildings.

The City of Worcester, by means of the restrictions in question, had required the defendant in error in effect to so use the surface of the streets as to not unreason-

ably wear the same out. Double track locations such as were most of these described in the record intensify travel upon the sides of streets, the inevitable tendency of which is to wear out paving much more rapidly than if travel could be distributed evenly over the whole surface of the street. The right of the city to have this paving kept in repair was as much a property right as would be blocks of paving purchased by the city for use upon the streets. Under Massachusetts decisions, all municipalities have a certain property right with reference to highways.

It is established by a long line of decisions of the Supreme Judicial Court of Massachusetts that although the repair of roads and bridges is by general law imposed upon cities and towns (Rev. Laws of Mass. c. 51, s. 1), yet because there is also imposed upon the municipality a statutory liability for injuries sustained in person or damage received in property by a traveler upon highways by reason of a want of repair in the highways, which might have been remedied by reasonable care on the part of municipalities (Rev. Laws of Mass. c. 51, s. 18), and because also of the penalties imposed upon municipalities for failure to keep its ways in repair (Rev. Laws of Mass. c. 51, ss. 17 and 23), and further because of the municipalities' responsibility for the cost of construction of ways, the municipality has such a direct pecuniary interest in the economical and thorough performance of the work of repair and construction of ways as to render it subject to a liability beyond that imposed by the statute, that is, to a common law liability, when and in the event that the municipality undertakes such work through its own agencies or by any other instrumentality than the public officers by law provided for the purpose, and that such liability exists even when such work is performed by the public officers under the special direc-

tion of the municipality, and not solely under their authority as public officers.

Perry v. Worcester: 6 Gray 544.
Deane v. Randolph: 132 Mass. 475.
Hill v. Boston: 122 Mass. 344.
Pratt v. Weymouth: 147 Mass. 245-254.
Brookfield v. Reed: 152 Mass. 568.
Collins v. Greenfield: 172 Mass. 78, 81.

In Tindley v. Salem: 137 Mass. 171, the court says upon this subject at page 173:

"In some of these cases, the assumption of the work by the town itself has been voluntary, and apparently because it preferred that the work should be done by special agents rather than by the surveyors, or others, upon whom, in the absence of such special provision, the law would devolve the duty of prosecuting it. But in all such cases a prominent element in the action of the city or town must have been with reference to its continuing liability to statutory penalties, or responsibility in damages to persons who might receive injuries in their persons or property through defects in the ways. This consideration was made the foundation of the decision in Hawks v. Charlemont, 107 Mass. 414. The case of Deane v. Randolph, 132 Mass. 475, is of the same class. In Sullivan v. Holyoke, 135 Mass. 273, there was evidence tending to show that, as incident to its liability for defective ways, the city had undertaken to light the streets, though not bound to do so, and that it kept naphtha for that purpose, and stored it negligently. The case was a close one; but in the opinion of a majority of the court it fell within the principle of Hawks v. Charlemont, and Deane v. Randolph. All that was decided in Perry v. Worcester, ubi supra, may stand also upon the same ground, as well as upon the ground heretofore mentioned. The city had voluntarily assumed, by agents of its own, to rebuild a bridge which it was bound to maintain and keep in re-

pair; and it performed the work in such a manner as to cause injury to private property, through unskilfulness or negligence. In all of these cases, the city or town was acting, not merely in the discharge of a public service, but also with refeence to penalties and liabilities imposed upon it by law for imperfect work. The pecuniary motive came in. It was acting in furtherance of its own pecuniary interest, as well as for the benefit of the public."

In the recent case of Butman vs. Newton: 179 Mass. 1, at page 6, the court re-affirms this rule of liability in the following language:

"A town which undertakes to make repairs on ways within its limits, by its own agents, is an exception to the general rule. (That is, of exemption from liability). In that case it has a pecuniary interest in the matter by reason of its statutory liability for a defect in the way; this distinction is pointed out, and the whole subject is so exhaustively stated by C. Allen, J., in Tindley v. Salem, 137 Mass. 171, 172, 173, that it is not necessary to restate the reasons at length in this case."

The City of Worcester thus, under the Massachusetts law, had a pecuniary private interest in the repairs of its streets, provided it undertook to act respecting its statutory liabilities through strictly municipal agencies, or through any other instrumentality than these provided by general law acting solely under the authority conferred by general law.

It follows as a necessary and inevitable corollary from this proposition of liability, that the municipality under the Massachusetts law has a right to undertake, through any instrumentality it may see fit to employ, the performance of its statutory obligation for the keeping in repair of highways. The above cited cases show that the city is immune from liability for the

negligence of those who repair its highways only when such repairs are undertaken through the public officers (which in Massachusetts are either highway surveyors, road commissioners or street commissioners) by general law provided for that purpose, and then only when these public officers are acting in the manner pointed out by the general law. Municipal liability for their negligence, when these officers are acting under the instructions of the municipality rather than in the manner marked out by statute, and municipal liability for the negligence of those other agencies by which the repair of streets may be undertaken, rests in its last analysis upon the right of the city to employ special agencies for the purpose of performing the duty of repair of ways, but this liability exists on the theory of agency, and such agency can only in turn rest upon valid action respecting the subject matter. Therefore, the municipality is recognized by the Massachusetts law as being clothed with authority to arrange in any way it sees fit as to the repair of streets. If it were not clothed with such authority, all acts of attempted supervision such as are discussed in Buttman vs. Newton, Perry vs. Worcester and the other cases above cited would be ultra vires, and the municipality would be under no liability.

Morrison vs. Lawrence, 98 Mass. 219.
Sampson vs. Boston, 161 Mass. 288.
Cavanagh vs. Boston, 139 Mass. 426.
Smith vs. Rochester, 76 N. Y. 506
Anthony vs. Adams, 1 Met. 284 at 287.

The City of Worcester had procured the laying of the pavement in the various streets in question by means of a compliance by the defendant in error with the conditions in the several grants of locations requiring pavement to be laid. This is distinctly alleged in the declara-

tion in the action of contract and in the petitions for mandamus and in the bills in equity. It thus acquired a property right to have continued by the Street Railway Company the performance of the duty reposed in the city to maintain the surface of the street in repair.

A board of municipal officers granted the extremely valuable privilege to the defendant in error of constructing and operating a street railway in certain streets of a large and rapidly growing city, and in return for receiving this inherently increasingly valuable privilege, the Street Railway Company was willing to and voluntarily did assume, by its formal acceptance of the grants of location, this obligation as to maintenance of the paving of streets and promised to relieve to the extent stated in the conditions the city of Worcester from its statute imposed liability to keep the streets in repair throughout their entire width.

This is a property right in the city of which even the Legislature had no right to deprive it. The question does not in this case arise whether the Legislature might transfer the obligation to keep the streets in repair to some other public body, either with or without the right against the Street Railway Company, but it is a question of relieving the private corporation of its obligation voluntarily assumed for a valuable consideration to do something for the city of Worcester. The construction contended for by the defendant in error, however, involves the taking away of this property right of the City and relieving the Street Railway Company entirely of its obligations in this respect without at all relieving the plaintiff in error of its statutory obligation to maintain the streets in repair, which still subsists without modification or derogation.

This contention of the plaintiff in error does not impinge at all upon the well-settled authority of the Legislature over municipalities in Massachusetts estab-

lished in Weymouth and Barre Fire District v. County Commissioners, 108 Mass. 142, and Commonwealth v. Plaisted, 148 Mass. 375, 386, nor upon the principle established by this court in East Hartford vs. Hartford Bridge Company, 10 How. 511. The claim of property right in the present cases rests upon the equally well recognized proposition that legislative power over municipalities is not universal and absolute and does not extend to property or property rights, acquired by a city for special purposes nor to rights of immunity, in respect to both of which the municipality is recognized as having a right of private ownership, of which it cannot be deprived in any other way than can other private owners of property be deprived.

In Mt. Hope Cemetery v. Boston, 158 Mass. 509 at page 512, the Supreme Judicial Court of Massachusetts said:

> "But the general doctrine that cities and towns may have a private ownership of property which cannot be wholly controlled by the State government, though the uses of it may be in part for the benefit of the community as a community, and not merely as individuals, is now well established in most of the jurisdictions where the question has arisen. Board of Commissioners v. Lucas, 93 U. S. 108, 114, 115. Mount Pleasant v. Beckwith, 100 U. S. 514, 533. Railroad Co. v. Ellerman, 105 U. S. 166, 172. Cannon v. New Orleans, 20 Wall. 577. Mayor, etc., of New York v. Second Avenue Railroad, 32 N. Y. 261. People v. Batchellor, 53 N. Y. 128. People v. O'Brien, 111 N. Y. 1, 42. Webb v. Mayor, etc., of New York, 64 How. Pr. 10. Montpelier v. East Montpelier, 29 Vt. 12. Western Saving Fund Society v. Philadelphia, 31 Penn. St. 175. People v. Detroit, 28 Mich. 228, 235, 236, 238. People v. Hurlburt, 24 Mich. 44. Detroit v. Detroit & Howell Plank Road, 43 Mich. 140. Thompson v. Moran, 44 Mich. 602. Louisville v. University of Louisville,

15 B. Mon. (Ky.) 642. Richland v. Lawrence, 12 Ill. 1. People v. Mayor, etc., of Chicago, 51 Ill. 1. Grogan v. San Francisco, 18 Cal. 590. Hewison v. New Haven, 37 Conn. 475."

The language used by the Supreme Court of the United States now to be quoted is decisive in support of this proposition.

In Board of Commissioners vs. Lucas, 93 U. S. 108, at 114 the court speaking through Mr. Justice Field said:—

> "Municipal corporations are mere instrumentalities of the State, for the convenient administration of government; and their powers may be qualified, enlarged or withdrawn at the pleasure of the Legislature. Their tenure of property, derived from the State for specific public purposes, or obtained for such purposes through means which the State alone can authorize, that is, taxation, is so far subject to the control of the Legislature, that the property may be applied to other public uses of the municipality than those originally designated. This follows from the nature of such bodies, and the dependent character of their existence. But property, derived by them from other sources, is often held, by the terms of its grant, for special uses, from which it cannot be diverted by the Legislature. In such cases, the property is protected by all the guards against legislative interference possessed by individuals and private corporations for their property. And there would seem to be reasons equally cogent, in abstract justice, against a diversion by the Legislature from the purposes of a municipality of property raised for its use by taxation from its inhabitants."

In Mt. Pleasant vs. Beckwith, 100 U. S. 514, at 533 the court speaking through Mr. Justice Clifford said:—

> "Cities or towns, whenever they engage in transactions not public in their nature, act under the same pecuniary responsibility as individuals, and are as much bound by their engagements as

are private persons, nor is it in the power of the Legislature to authorize them to violate their contracts."

In Broughton vs. Pensacola, 93 U. S. 266 at page 269, the court speaking through Mr. Justice Field said:

> "The inhibition of the Constitution, which preserves against the interference of a State the sacredness of contracts, applies to the liabilities of municipal corporations created by its permission; and although the repeal or modification of the charter of a corporation of that kind is not within the inhibition, yet it will not be admitted, where its legislation is susceptible of another construction, that the State has in this way sanctioned an evasion of, or escape from, liabilities, the creation of which it authorized."

Mr. Justice Matthews, delivering the opinion of the court in New Orleans, M. & T. R. Co. vs. Ellerman, 105 U. S. 166 at 172, said:—

> "Whatever powers the municipal body rightfully enjoys over the subject is derived from the Legislature of the State. They are merely administrative and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration."

As supporting the contention that the municipality has full and complete control of streets and impliedly, therefore, the right to make any arrangement as to their use and repair which it may think best, the language is most significant which was used by Mr. Justice Harlan in Richmond v. Southern Bell Telephone & Telegraph Company, 174 U. S. 761 at page 777:

> "But we are unwilling to rest the construction of an important act of Congress upon implication merely; particularly if that construction might tend to narrow the full control always exercised by the local authorities of the states over streets and alleys within their respective jurisdictions."

The cases before cited, showing the property interest and pecuniary rights of a municipality as to a public way, when taken in conjunction with the contract power of the municipality with reference to the repair of streets, established in Brookfield v. Reed, 152 Mass. 568, places the property rights of the city in respect of highways, upon the same basis as its property rights with in sewer systems and water works. Property rights of municipalities in sewers are recognized in a multitude of cases.

In Johnston v. District of Columbia, 118 U. S. 19, the court, speaking through Mr. Justice Gray, says:—

> "The duties of municipal authorities in adopting a general plan of drainage and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience thoughout an extensive territory; and the exercise of such judgment and discretion, in the selection and adoption of the general plan or system of drainage, is not subject to a revision by a court or jury in a private action for not sufficiently draining a particular lot of land. But the construction and repairs of sewers, according to the general plan so adopted, are simply ministerial duties; and for any negligence in so constructing a sewer, or keeping it in repair, the municipality which has constructed and owns the sewer may be sued by a person whose property is thereby injured."

Mr. Justice Folger, speaking for the Court in Maxmilian v. Mayor, 62 N. Y. 164, says:

> "There are two kinds of duties which are imposed upon a municipal corporation. One is of that kind which arises from a grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of

which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public, and is used for public purposes. The former is not held by the municipality as one of the political divisions of the State; the latter is. In the exercise of the former power, and under the duty of the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the State, and is conferred, not for the immediate benefit of the municipality, but as a means to the exercise of the the sovereign power for the benefit of all citizens, the corporation is not liable for non user, nor for misuser by the public agents."

Other cases of the Supreme Judicial Court of Massachusetts holding the municipality liable, as any private corporation is liable, for sewer works (recognizing thus the private property right of the city in the sewer system) are—

Coan v. Marlborough, 164 Mass. 206-208.
Child v. Boston, 4 Allen 41.

Water works owned by a city are also treated with reference to liability, as private property, and the municipality held to the same degree of liability as it would if it were an aqueduct corporation.

Hand v. Brookline, 126 Mass. 324.
Johnson v. Worcester, 172 Mass. 122.
Lynch v. Springfield, 174 Mass. 430.
Esberg Gunst Co. v. Berlin, 55 Pacific Rep. 961. s. c. 34 Oregon 282.
Walla Walla vs. Walla Walla Water Co., 172 U. S. 1.

Of course, it could not successfully be contended that the water works, or the sewer system of the City of Worcester, could be taken away from it and handed over to somebody else without due compensation, and

yet, its rights and liabilities with reference to the repair of streets, obtained from the defendant in error, rest upon the same basis in principle as does the acquisition of a water works plant or a sewer system.

Wharves owned by a municipality, which receives and charges wharfage for their use, are the property of the municipality, which has with reference to it the ordinary incidents of private ownership.

Mersey Docks Board v. Gibbs, 11 H. L. Cases, 686.

Petersburg v. Applegarth, 28 Gratton, 321.

Pittsburgh v. Grier, 22 Pa. St. 54.

So also gas works owned by the city are maintained as much for the private emolument and advantage of the city as for the public good, and the whole investment is the private property of the city, which cannot be confiscated or taken from the city by eminent domain.

Western Savings Fund Society v. Phila., 31 Pa. St. 183.

San Francisco Gas Co. v; San Francisco, 9 Cal. 483.

In Middleborough v. New York, New Haven & Hartford Railroad Co. (179 Mass. 520), the Supreme Judicial Court of Massachusetts strongly intimates that an electric light plant of a municipality cannot be taken without compensation.

To deprive the City of Worcester of the right to have the defendant in error furnish its paving blocks year by year as required is as much confiscation of private property as for the legislature to convert the City Hall into a station for the street railway company, or to compel the city to turn over its electric light plant, if it owned one, to furnish power for the company. Because the property right which the city had acquired for its private advantage and emolument in providing for the main-

tenance and repair of its streets related to a subject-matter, about which it had also public responsibilities and relations, thus blending in a measure powers and rights granted exclusively for public purposes and those acquired for private advantage may create some difficulty in distinguishing them in the mind, but the distinction is clear and well settled, and the process of separation of the rights and responsibilities attaching to the exercise of each is practicable.

B

The City of Worcester has a special proprietary right in the property of the defendant in error reserved to it in the original statute incorporating the Worcester Horse Railroad Company, Chap. 148 Mass. Laws of 1861.

Sections 12 and 13 of said act are as follows:

> Sec. 12. "The city of Worcester may, at any time during the continuance of the charter of said corporation, and after the expiration of ten years from the opening of any part of said road for use, purchase of said corporation all the franchise, property, rights, and furniture of said corporation, by paying therefor such a sum as will reimburse to each person who shall then be a stockholder therein, the par value of his stock, together with a net profit of ten per cent. per annum from the time of the transfer of said stock to him on the books of the corporation, deducting the dividends received by said stockholders thereon.
>
> Sec. 13. This act shall be void, so far as relates to the right to construct said road in said city of Worcester, unless the same shall be accepted by the mayor and aldermen of said city of Worcester, and unless the same shall be accepted by said corporation, and unless said road shall be located within two years from the passage of this act."

This right of purchase has followed through the mutations in name of the company, each successive statute providing that the new named company should possess the franchise of the earlier named company, with all its powers and privileges, and be subject to all the duties, liabilities and restrictions of the old company. See chapter 141, Laws of 1867, chapter 356, Laws of 1869, both of which relate to the Worcester Street Railway, and chapter 284, Laws of 1887, which relates to the Worcester Consolidated Street Railway Company.

The original property right of the city of Worcester in the property of the street railway company was recognized by the requirement that the act incorporating the company and providing for the construction of the railway should be accepted by the representatives of the city. The reservation to the city of Worcester of the right of purchase may fairly be assumed to be constitutional and legal from the fact that the early acts of incorporation of street railway companies by the Legislature of Massachusetts all contained the reservation of purchase, thirty-six or more such acts having been passed between and including the years 1853 and 1868, in all of which substantially the same section as to purchase was inserted as in the Worcester statute. A schedule of these acts is printed as appendix C. of this brief.

No question has ever been raised as to the constitutionality of these statutes in the Supreme Judicial Court of Massachusetts, and in the only two cases where the subject-matter has been before the Court there has been no intimation that the section authorizing the purchase by the municipality was not a proper exercise of legislative authority, and did not confer rights upon the city.

Richardson vs. Sibley, 11 Allen, 65.
Cambridge vs. Cambridge Railroad Co., 10 Allen, 50.

The case of Richardson vs. Sibley relates to the Worcester Company, and the Court, speaking through Mr. Justice Gray, said, on pages 67 and 68, relating to such railways in general:

> "The main object of the Legislature in establishing such corporations, and granting to them the privilege of using the highways in a peculiar manner, is not a profit of the grantees, but the accommodation of the public. . . . . The right is given to the City of Worcester at any time during the continuance of the charter, and after ten years from the opening of any part of the road for use to 'purchase of said corporation all the franchise, property, rights and furniture of said corporation' at a certain rate."

The very presence of this provision implies that the City of Worcester has rights reserved in the property of the defendant in error, which are in the nature of a contract right, and which of itself imposes a duty upon the officers of the city to constantly guard its corporate interests, and at all times when dealing with the interdependent relations which exist between the municipality and the company, to have an eye unclouded by the arguments of temporary expediency and single to this most important and enduring right.

> See Boston & Albany Railroad vs. Cambridge, 159 Mass., 283 and 287.

This right of purchase by the City of Worcester of the franchise and other property of the defendant in error places the plaintiff in error upon a different ground in dealing with the defendant company as to grants of locations and otherwise, from that which it might occupy in dealing with a street railway company in which it had no rights especially reserved. This right by implication

carries with it powers in the city and limitations upon the company which would not otherwise exist.

Braintree Water Supply Co. vs. Braintree, 146 Mass., 482.

Rockport Water Co. vs. Rockport, 161 Mass., 279.

The existence of the right of purchase speaks with emphasis against any interference even by the Legislature with a voluntary agreement, freely entered into between the company and the city, respecting matters which cannot fail in the event of a purchase being made under the authority of the statute, to affect the price which the municipality might be obliged to pay for the property taken. While the city would have no right to complain of any general laws that might be passed by the Legislature relating to taxation of the property of the defendant in error and changing the basis, theory or details of such tax laws, yet the right of purchase is such a distinct property right upon which the city presumably may have been relying ever since the construction of street railways in the City of Worcester that any law sweeping away engagements made between the company and the city must affect the latter's property rights.

2.

As to Person.

A municipal corporation is a "person" within the meaning of that word as used in the Fourteenth Amendment to the Federal Constitution.

It has been decided that the word "corporation" as used in certain statutes, includes a municipal corporation.

This court said, in Loeb v. Trustees of Columbia Township, 179 U. S. 472, at page 486, in discussing the words "any corporation" as used in the judiciary act of August 13, 1888, c. 866 (25 statutes at large, 433-43, s. l.)

"It must therefore be taken that the words 'any corporation' in the act of 1888, include municipal as well as private corporations."

To the same effect:

Andes v. Ely, 158 U. S. 312;
1 Dillon on Municipal Corporations,
4th Edition, s. 18, 19 and 20.

The Massachusetts statute in force when these locations were granted (Mass. P. S., c. 3, s. 3, Cl. 16) enacted:

"Sixteenth. The word 'person' may extend and be applied to bodies politic and corporate."

Such is now the law of Mass. R. L. c., 8, sec. 5, Cl. 16.

"It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws."

Covington and L. Turnpike R. R. Co. v. Sandford, 164 U. S. 578—592.
Pembina Consolidated Silver Mining Co. vs. Pennsylvania, 125 U. S. 181.

3.

Whether the State of Massachusetts has by its legislation deprived this person of its property without due process of law involves the interpretation of the Mass. statute. This can more conveniently be discussed in connection with the question whether the statute has impaired the obligation of contract, which is the next general topic on this brief.

IV.

HAS THERE BEEN STATE LEGISLATION IMPAIRING THE CONTRACT OBLIGATIONS OR TAKING AWAY PROPERTY RIGHTS WITHOUT DUE PROCESS OF LAW?

It is contended by the plaintiff in error that by enacting chapter 578 of the laws of 1898 the legislature did not attempt or intend to either abrogate or impair any contract obligations then binding upon street railway companies under the provisions of existing laws or to sweep out of existence any property or property rights.

The material portions of c. 578, Massachusetts Laws of 1898 are as follows:—

> Section 1. * * "'Location' shall mean the grant to a street railway company by vote or order of a board of aldermen of a city or selectmen of a town, when duly accepted by such company, of the right to construct, maintain and operate a street railway in a public highway or street in such city or town. And 'original location' of a company in any city or town shall mean the first location granted to it in such city or town."

Sects. 2 to 5, both inclusive, relate solely to taxation.

Sect. 6 requires a return to the assessors of each town and city of the length of track operated by it and its gross receipts.

Sect. 7 is as follows:—

> "Section 7. On or before the first day of November in each year the assessors of every city and town in which any street railways are operated shall assess on each company operating such railways therein, an excise tax of an amount equal to such proportion of the following percentages

of the gross receipts of such company as the length of tracks operated by it in public ways of such city or town bears to the total length of tracks operated by it in public ways, to wit:—

"In case of companies whose annual gross receipts per mile of track operated are four thousand dollars or less, one per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than four thousand dollars and less than seven thousand dollars, two per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than seven thousand dollars and less than fourteen thousand dollars, two and one-quarter per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than fourteen thousand dollars and less than twenty-one thousand dollars, two and one-half per cent. of the total annual gross receipts; in case of companies whose annual gross receipts per mile of track operated are more than twenty-one thousand dollars and less than twenty-eight thousand dollars, two and three-quarters per cent. of the total annual gross receipts; and in case of companies whose annual gross receipts per mile of track operated are twenty-eight thousand dollars or more, three per cent. of the total annual gross receipts. The excise tax provided by this section shall be in addition to the taxes now provided by law."

Sect. 8 is as follows:—

"Section 8. At any time after the end of three years from the first day of October, in the year eighteen hundred and ninety-eight the selectmen of any town, or the aldermen of any city, or any street railway company operating in such town or city, may petition the board of railroad commissioners for a revision of the amount of the excise tax to be thereafter paid by said company under the preceding section; and said board shall there-

upon proceed to investigate and determine, after public notice, and a hearing at which said selectmen or aldermen and said company may submit such evidence as may be pertinent, the average annual cost to said town or city of the work done by it during the preceeding three years under the provisions of this act which by law it was not previously required to do, and also the average annual payments made by said company to said town or city under and pursuant to said section during said three years; and having ascertained and determined said average annual cost and average annual payments, said board shall thereupon determine and fix the proportion of the percentage of the gross receipts which shall be paid as an excise tax under said section by the company to said town or city annually thereafter, said proportion to be fixed at such a rate as will be necessary to yield to said town or city annually thereafter an amount equal to the average annual cost to said town or city of the work done by it during the preceding three years under the provisions of this act and which it was not by law previously required to do, as determined as aforesaid; and the proportion of the percentage so fixed shall not be again changed for the period of three years, and not, except in the manner herein provided. Said board may at any time upon petition therefor by any city or town entitled to any part of the excise tax paid by any street railway company, after such notice as the board may order to all other cities and towns entitled to share in the excise tax paid by said company, and after a hearing, determine as to the distribution thereof among the several cities and towns in which such company operated any part of its railway, and fix the proportions thereof to which they shall respectively be entitled, which shall thereafter be the proportions of said excise tax to be assessed upon said company under the provision of this act, instead of the proportion based upon length of tracks as hereinbefore provided."

Sects. 9 and 10 relate to the collection and use of this excise tax.

Sect. 11 is as follows:—

"Section 11. Street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair, *but they shall remain subject to all legal obligations imposed in original grants of locations*, and may, as an incident to their corporate franchise, and without being subject to the payment of any fee or other condition precedent, open any street, road or bridge in which any part of their railway is located, for the purpose of making repairs or renewals of the railway, or any part thereof, the superintendent of streets or other officer exercising like authority, or the board of aldermen or selectmen, in any city or town where such are required, issuing the necessary permits therefor." * * * * * * *

Sect. 12 relates to the clearing of snow from tracks and sect. 13, after providing for petition and notice upon the same for original location, continues :

Section 13. * * * * "In granting said location they may prescribe the manner in which said tracks shall be laid, and the kind of rails, poles, wires and other appliances which shall be used, and they may also impose *such other terms, conditions and obligations in addition to* those applying to all street railways under the general provisions of law, as the public interest may in their judgment require; and the location thus granted shall be deemed and taken to be the true location of the tracks of the railway, if an acceptance thereof in writing by said directors is filed with said board of aldermen or with said selectmen within thirty days after receiving notice of the granting of the location. * * * (Provisions as to protest of abutters and construction). * * * * * * "*All locations heretofore granted or in use are hereby ratified and confirmed, as if accepted under the provisions of*

this section, and shall continue in force, subject only to revocation as provided in section seventeen, and to all provisions, restrictions, regulations or conditions, applying to all street railways under the general law as now in force except so far as changed or modified by this act."

Sect. 14 relates to procedure in case of failure to obtain original location connecting two cities or towns.

"Section 15. The board of aldermen of a city or the selectmen of a town, upon the petition of fifty legal voters or the board of directors of a street railway company whose tracks are located in said city or town, and after notice and hearing as provided in section thirteen of this act, may grant a location for the extension of the tracks of such company and prescribe the manner in which said tracks shall be laid and the kind of rails, poles, wires and other appliances which shall be used; but they shall not impose as terms or conditions of such grant any obligations other than or in addition to those applying to all street railways under the general law in force at the date of the passage of this act, or such as may have been imposed in the original grant of location to such company in such city or town subsequent to the passage hereof. The provisions of section thirteen of this act as to acceptance, and as to protest of abutters and approval by the board of railroad commissioners, shall apply to grants of extensions under this section."

Sect. 16 relates to alteration of location.

Sect. 26 repeals sects. 7, 21, 23, 27, 32, 44 and 45 of c. 113, Public Statutes of Massachusetts.

Section 26 of said chapter 578 repeals sections 21, 32, 44, and 45 of chapter 113 of the Public Statutes already referred to, also section 7 providing for the grant of original locations, sections 22 to 24 providing for the alteration and revocation of locations, and so much of section 27 as relates to the removal of snow and ice.

The Supreme Judicial Court of Massachusetts in the Springfield case (which is referred to in the opinion in the cases at bar for the discussion of the constitutional principles) said, — "If there is a contract, as the plaintiff contends, which we do not intimate, it would seem to be between the plaintiff and the defendant, and the plaintiff would seem to be the proper party to enforce it." . . . . We also assume without deciding that the conditions were lawfully imposed." . . . . (Then referring to ss. 4, 7, 10, 11 and 26 of c. 578, Mass. Laws of 1898, the court proceeds to say)— "There can be no doubt, we think, that if the provisions to which we have referred stood alone, the effect of the statute would be to abrogate the conditions on which the location was granted." . . . . (Then after a further discussion of the sections of the statute, the court concludes that portion of the discussion by saying)— "We think, therefore, as already observed, that the statute abrogates the conditions relied on."

Where, as in the case at bar, the validity of the state statute was attacked upon the very ground that it was in conflict with the contract clause of the federal constitution, and also in conflict with the fourteenth amendment of the federal constitution, this court examines *de novo* the meaning of the statute and places its own interpretation upon it without regard to the determination of the state court.

Referring to the contention that this court was not bound by the construction placed upon state statute by the decision of the highest court of the state, this court said in McCullough vs. Virginia: 172 U. S. 102, at pp. 109 and 110:—

> "It is insisted that whatever may be our own opinions upon the case, we are to take the construction placed by the court of appeals of Virginia upon the act as the law of that state. While it is undoubtedly the general rule of this court to accept the construction placed by the courts of a

state upon its statutes and Constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired. This was distinctly affirmed in Jefferson Branch Bank v. Skelly, 1 Black, 436, 443 [17: 173, 177], in which the court, speaking by Mr. Justice Wayne, gave these reasons for the exception: 'It has never been denied, or is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the supreme court of a state, when ever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the supreme court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the supreme court of a state? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the supreme court of a state in such a matter, when it entertained a different opinion.' The doctrine thus announced has been uniformly followed. Bridge Proprietors v. Hoboken Land & Improv. Co. 1 Wall. 116, 145 [17: 571, 576]; Wright v. Nagle, 101 U. S. 791, 793 [25: 921, 922]; McGahey v. Virginia, 135 U. S. 665, 667 [34; 305, 306]; in which, in reference to this very contract, it was said: 'In ordinary cases the decision of the highest court of a state with regard to the validity of one of its statutes would be binding upon this court; but where the question is raised,

whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the perogative of this court under the Constitution of the United States and the acts of Congress relating to writs of error to the judgments of state courts, to inquire and judge for itself with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto.' See also Douglas v. Kentucky, 168 U. S. 488, 501 [42: 553, 557], and cases cited therein".

In Yick Wo v. Hopkins, 118 U. S. 356, this court speaking through Mr. Justice Matthews, after stating that the question whether the imprisonment of a plaintiff in error was legal under the Constitution and laws of the state was not open in this court, said:—

"That, however, does not preclude this court from putting upon the ordinances of the supervisors of the County and City of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge."

In Mobile & Ohio R. Co. v. Tennessee, 153 U. S. 486, speaking through Mr. Justice Jackson, the court says:

"It is contended by counsel for defendants in error that this court is without jurisdiction to review the judgment of the supreme court of Tennessee, because it was based, or proceeded, upon the ground that there was no contract in existence between the railroad company and the state to be impaired, and that the supposed contract was in violation of the state constitution of 1834, and hence not within the power of the legislature to make. In support of this proposition there are cited Mississippi & M. R. Co. v. McClure, 10 Wall, 515; Boyd v. Alabama, 94 U. S. 645; Yazoo & M. V. R. Co. v. Thomas, 132 U. S. 174; and New Orleans v. New Orleans Water Works Co. 142 U S. 79.

These decisions need not be specially reviewed, for they clearly do not apply to the case under consideration. It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation. A brief reference to some of the authorities is sufficient to show this."

In Wilson v. Standefer, 184 U. S. 399, at pp. 411 and 412, the court, speaking through Mr. Justice Shiras, says: —

"We are first confronted with a question of construction. The supreme court of Texas having held that s. 12 was a law, and not a term of contract with a purchaser, is it open for this court to put a different construction upon the statute? It is settled law that this court, when reviewing the final judgment of a state court, upholding a state enactment alleged to be in violation of the contract clause of the Constitution, possesses paramount authority to determine for itself the existence or the non-existence of the contract set up, and whether its obligation had been impaired by the state enactments. Jefferson Branch Bank v. Skelly 1 Black, 436; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co., 125 U. S. 18; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486; Chicago, B. & Q. R. Co. v. Nebraska ex. rel. Omaha, 170 U. S. 58 McCullough v. Virginia, 172 U. S. 102."

1.

Prior to the passage of chapter 578 street railway companies were required under the provisions of section 32 of said chapter 113 to keep certain portions of the surface material of streets in repair regardless of whether they were bound so to do by the terms of their locations; and the provision of section 11 of said chapter 578 that "Street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair, but they shall remain subject to all legal obligations imposed in original grants of locations" was intended to show that the repeal of said section 32 of chapter 113 applied both to existing and to future locations only in cases where there was no condition in the location requiring the company to repair; excepting, however, as appears from section 15 of chapter 578, that if the original grant of a location to a company subsequent to the passage of chapter 578 did not contain a condition requiring repairs then no grant thereafter made to the same company could contain such a condition.

That the proviso that "they shall remain subject to all legal obligations imposed in original grants of locations" refers only to original grants subsequent to the passage of the act, is apparent from a careful consideration of section 11 together with section 13 which provides that the municipal board in granting a location may also impose such "other terms, conditions and obligations, *in addition to those applying to all street railways under the general provisions of law*, as the public interest may in their judgment require," and with section 15 which provides that "they shall not impose as terms or conditions of such grant any obligations other than or in addition to those applying to all street railways under the general law in force at the date of the passage of the act, or such as may have been imposed in the

original grant of location to such company in such city or town *subsequent to the passage hereof.*"

Section 1 of chapter 578 says, "An original location of a company in any city or town shall mean the first location granted to it in such city or town." But a "grant of an original location" is not the same thing as an "original grant of a location" for the former means the first location of a company in a city whether granted *before or after* the enactment of chapter 578, while the latter means the first location of a company in a city granted *after* the passage of chapter 578, and this distinction is maintained throughout all the provisions of the chapter.

If the words "original grant of location" as used in section 15 be held to mean "grant of original location" as "original location" is defined in section 1 then there is no provision whatever made in the act for the granting of extensions where the original location was granted *before* the passage of the act.

Furthermore, if the words "original grants of locations" in section 11 were held to refer to grants of original locations before the passage of the statute, then the legislature must have intended to preserve the obligation of companies contained in the first grant of a location made when the company was in its infancy and the whole subject of the relation of the company to the city or town a science quite unknown in municipal administration, which might cover two or three or half a dozen of streets, and abrogate the obligations contained in succeeding extensions which might cover scores of streets. Entirely aside from the question of the constitutionality of such a provision there is no conceivable reason why the legislature should make or could have intended to make, any such distinction.

Another sufficient reason for the use of the words is found in applying them to grants subsequent to the

passage of the act, for if the clause providing that "they shall remain subject to all legal obligations imposed in original grants of locations" had not been inserted then it might well have been argued that the preceding clause providing that "street railways shall not be required to keep any portion of the surface material of streets, roads and bridges in repair," was intended not only to relieve the railway company from repairs on streets where its tracks had already been laid under locations containing no condition requiring repairs, but also to prevent the company being required to repair by any condition in a future location, original or otherwise, which, of course, was not the case.

Section 13 of chapter 578 gives the municipal board power (in addition to prescribing the manner of laying the tracks, and the kind of rails, poles, wires and other appliances to be used), to impose as terms and conditions *of the location* not only the obligations imposed under general provisions of law but also any other obligations that the public interest may in their judgment require. In view of the unrestricted discretionary power here given to municipal boards, the legislature would have been careful to specify that the repair of surface material of streets should not be required *by the terms of any future location* if such had been its intention.

The clause "Street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair, but shall remain subject to all legal obligations imposed in original grants of locations" means simply that in the absence of any condition in any *prior* or *future* location, or of any contract between the parties, requiring the railway company to make repairs, then in such case the statute says the obligation shall rest upon the city, instead of

upon the company as provided by section 32 of chapter 113.

The last paragraph of section 13 which provides that "All locations heretofore granted or in use are hereby ratified and confirmed, as if accepted under the provisions of this section, and shall continue in force, subject only to revocation as provided in section 17, and to all provisions, restrictions, regulations or conditions, applying to all street railways under the general law as now in force, except so far as changed or modified by this act," makes still clearer the intention of the legislature that all prior locations shall be left unaffected by the passage of the act, except as to the power of revocation which is made subject to the approval of the board of railroad commissioners, and excepting the modifications in the provisions of the general law, that is, the legislature makes such changes as it deems best in the provisions, restrictions, regulations and conditions prescribed by the general law, which are, of course, entirely within its power, while it professes to make no change in the terms or conditions of the locations themselves, but expressly ratifies and confirms them.

It is apparent also upon a careful examination of sections 7 and 8 of said chapter 578, that the excise tax provided for in section 7 was intended to reimburse the municipality for the cost "of work done by it . . . under the provisions of this act which *by* LAW it was not previously required to do," and there is no provision which requires or implies or suggests that after the passage thereof the municipality is to do any work from which it was previously exempt *by the terms of a location or other contract.*

And this must be so for if it was intended that the tax should cover the cost of work from which the city was previously relieved by location contracts as well as by

law, that would include the expense of block paving throughout the width of the street --- that is, if we suppose those contracts to be abrogated by chapter 578 as is contended by the respondent; while if its contention that future location contracts as to repairs are forbidden is also correct, then as to locations granted after the passage of the act there would be no definite basis of computation, because as to such locations you could not tell from how much the municipality would have exempted itself if it retained the same right to impose location conditions relating to repairs that it had before the passage of the act of 1898.

On the other hand if "by law" means statutory provisions, the basis and method of computation is simple both as applied to past and to future locations; and no injustice is done the railway companies, if they are still required to make repairs in accordance with location conditions, either past or future, because the amount of the cost to the city on account thereof, for which it might be compensated under sections 7 and 8, would be reduced just so much, and if the municipality were put to no additional cost because of the passage of chapter 578, then after the expiration of three years there would be no excise tax; the result of it all being to leave the railway companies and municipalities free to contract, by location conditions or otherwise, as to the care of streets, while under the old provisions of chapter 113 the railway companies were obliged by *law* to make certain repairs regardless of location conditions.

2.

Whatever may be the interpretation given to the first sentence of s. 11 of said c. 578, as to whether it applies only to future locations granted under the provisions of that act, or whether it applies to all prior locations, nevertheless the concluding sentence of s. 13 ratifies

and confirms all locations heretofore granted and preserves all the conditions in locations which it is contended are valid in these proceedings. That sentence defines the status of all locations heretofore granted or in use and ratifies and confirms them to all intents and purposes, and then states that they shall continue in force, "subject only to revocation as provided in section seventeen, and to all provisions, restrictions, regulations or conditions, applying to all street railways under the general law as now in force except so far as changed or modified by this act".

In order to construe that paragraph as eliminating all conditions other than those applicable to all street railways, it is necessary to apply the word "only" to all the language which follows. This, however, does not seem a reasonable construction of the statute, in view either of its sense or of its punctuation. But it would appear that the old locations were subject only to be revoked in accordance with the seventeenth section of the statute of 1898, and that they also shall be subject to all provisions, restrictions, conditions and regulations of the general law without any terms providing that the lawful conditions annexed to their original locations shall be abrogated or abridged.

The history of said c. 578 may throw some light upon the construction to be given to this clause. In his inaugural message of 1897, the then Governor Wolcott called the attention of the Legislature to the subject of street railways and their relations to cities and towns, in the following language:

> "The essential difference between street railway companies and railroad corporations lies in the fact that the former have the right to use, in common with other citizens, the public highways, whereas the latter have the exclusive use of their road beds. In contemplation of law this right to use the public ways is granted such companies on the

sole ground that it is for the 'interest of the public' that they be allowed so to do; this phrase recurring repeatedly in the statutes authorizing boards of aldermen in cities and the selectmen of towns to grant, refuse, extend and revoke locations. In theory therefore the granting of a location is an accommodation to the public, and not a privilege or gift to the railway company; the franchise being granted solely for the convenience of all the citizens as a method of affording cheap and convenient transportation over public ways. Upon this theory, if it is found that the right of thus using the streets is profitable beyond a moderate return upon the capital actually invested, it is just to require that the fares be reduced or the service improved. If this remedy were proved in practice to be easy of application it would afford the best solution of a vexed problem. But this has not been found to be the case, and, in consequence, contrary to the theory of our existing law, these grants have often proved of great pecuniary value to the companies receiving them. This has led to a general demand that a direct return shall be made to the treasury of the municipality, either by a fixed rental or tax, by a toll upon the cars using the streets, or by a percentage of receipts or profits. This can be justified only upon a different theory; namely, that a valuable right is granted to the company, and therefore is taken away from the public. If such a direct return is exacted it seems just, on the other hand, that the company, under a proper agreement, should, for a limited period, have the assurance that its franchise should not be revoked through caprice, unreasonable hostility, or the lure of a higher bid from would-be competitors. It is possible that in some municipalities one of these conflicting theories might be more acceptable, whereas in others the public convenience might be better served by adoption of the other. Under existing legislation there is no authority to impose any tax whatever. I recommend that this authority be granted."

(Page 644, Mass. Acts and Resolves of 1897). C. 509, Massachusetts Laws of 1897, provided for the appointment of a committee by the Governor to investigate the subject of the relations between street railway and municipal corporations. S. 2 of that act was as follows:

"Section 2. The said committee shall forthwith proceed to investigate and consider the relations existing between cities and towns and street railway companies, the taxation of street railways and their franchises in this Commonwealth and in other states and countries, and *shall consider what legislation, if any, is needed to establish a more fixed tenure of franchises of street railways, and an equitable method of taxation thereof in this Commonwealth.*"

It is to be noted that this statute did not on its face require a report as to legislation, except upon two subjects.—*first, a more fixed tenure of locations,* and *second, an equitable method of taxation.* Of course, the Legislature of 1898 was not bound by the limitations contained in this section, but it is important as throwing a sidelight upon the interpretation to be given to a doubtful enactment following and based upon the report of that committee. That committee reported a bill which is House Document No. 475 of the year 1898. The section corresponding to section 11 was as follows:—

"Section 10. Street railway companies shall not be required to keep any portion of the surface material of streets, roads and bridges in repair; but whenever the same is disturbed by reason of the original construction or subsequent alteration or extension of any railway, or by reason of any repairs or renewals of the railway or any part thereof, the company owning or operating such railway shall at its own cost renew and replace said surface material with the same form of construction, or with such other form as the superintendent of streets, or other officer exercising like powers, shall approve, and shall restore the same to as good condition as the same was at the time of such disturbance. Every street railway company shall be liable for any loss or injury that any person may sustain by reason of the carelessness, neglect or misconduct of its agents or servants in the construction, alteration, extension, repair or renewal

of its railway, or in the renewal or replacing of the surface of the streets disturbed as aforesaid."

That corresponding to section 13 is as follows:

"Section 12. The board of aldermen of a city or the selectmen of a town, upon the petition for an original location of tracks in such city or town by the board of directors of a corporation organized under the provisions of sections two to six inclusive of chapter one hundred and thirteen of the Public Statutes, or under a special legislative act, shall give notice to all parties interested of the time and place at which they will consider such petition, at least fourteen days before the meeting of such board or selectmen for considering said petition, by publication in one or more newspapers published in said city or town, and if none such is published then by publication in one or more newspapers published in the county in which said city or town is located; and after hearing, if in their opinion public convenience and necessity require, they shall grant said location, or any portion thereof. In granting said location, they may prescribe the manner in which said tracks shall be laid, and the kind of rails, poles, wires and other appliances which shall be used, and they may also impose such other terms, conditions and obligations in addition to those applying to all street railways under the general provisions of law, as the public interest may in their judgment require; and the location thus granted shall be deemed and taken to be the true location of the tracks of the railway, if an acceptance thereof in writing by said directors is filed with said board of aldermen or with said selectmen within thirty days after receiving notice of the granting of the location.

If either the majority in value as determined by the last preceding assessment for taxation, or not less than ten in number, of those owning real estate abutting on any public way in which a location of a street railway has been granted shall, within thirty days after the granting of such location, file a written protest with the board of railroad commissioners, such location shall not be valid so far as such way is concerned until approved by the board of railroad commissioners after public notice and a hearing. No company shall commence construction under an order of a board of aldermen or of selectmen granting a location as aforesaid until the expiration of the time in which such protest may be filed with said board of railroad commissioners, nor, in case such protest is so filed, until said board of railroad commissioners has taken final action thereon approving the same."

The committee's note at the conclusion of this section is as follows:—

"[The first paragraph (lines 1-29) of section 12 modifies the existing law regulating the grant of locations only in so far as is necessary to make it conform to the interpretation of that law which has in practice grown up (see pages 22 and 23 of

the Report). The second paragraph (lines 30-46) is discussed, and grounds on which it is recommended are set forth, on page 25 of the Report]."

Pages 22 and 23 of the report are printed in this brief pp. 24, 25 and 26.

The committee on Street Railways, to whom the report of the committee of 1897 was referred, reported to the House a bill substantially in the form of the one prepared by the committee appointed as aforesaid by the Governor. Soon afterward the bill was amended in the House by adding in Section 11 after the provision that street railway companies should not be required to keep any portion of the surface material of streets, roads and bridges, in repair, the following words, "except as otherwise provided in the original grant of locations," and the said bill was likewise amended by adding at the end of section 13 the words before quoted and now in the Statute. The former amendment remained in the same form through all the stages of the passage of the bill, in which the bill was amended in various places, until near the time of its enactment, when the words now found in section 11 of the Statute were substituted, and the bill enacted in that form. As the bill was reported by the Committee of 1897, the intent was very clear to exempt all street railway companies from any liability to repair the surface material of the ways.

The only inference to be drawn from these amendments tacked on to these vital sections is that the Legislature intended to preserve all obligations, which had theretofore been regarded as a subsisting liability on the part of the street railway company.

Ss. 13 and 15, c. 578 of the Laws of 1898, make clear beyond the peradventure of a doubt the authority of the local boards to impose the obligation upon a new company applying for a location to keep the whole or any part of the street through which the tracks run in

repair. The argument that said c. 578 intends an abrogation of all conditions contained in all extensions of locations inevitably leads to the conclusion that the Legislature of Massachusetts intended to protect and preserve then existing street railway companies to the extent practically of monopolizing desirable locations, to the exclusion of all new companies. The older the company the more reasonable it may be to infer that the lighter were the obligations imposed in original locations. Therefore, such old and well established companies in centers of population, where the traffic may be presumed to be much more heavy and profitable than in the routes still open for occupation in 1898, if relieved of all obligations in extensions of locations respecting paving, have opportunities for profit conserved to them by express legislation, of which companies incorporated after 1898 may be utterly deprived by the act of the local boards in granting new locations. Such a deliberate intention on the part of any Legislature is inconceivable, and such an interpretation of any act of the Legislature should not be given unless no other reasonable construction can be placed upon it.

If, however, the statute means what the defendant in error contends and what the Supreme Judicial Court of Massachusetts determined that it meant, it both impairs the obligation of the contract between the plaintiff in error and the defendant in error, and deprives the plaintiff in error of its property without due process of law.

V.

AS TO FORM OF REMEDY.

It is probable that under the terms of the reservations in the two petitions for writs of mandamus, numbers 144 and 146 no question is open, or will be considered by this court as to the form of remedy. It is perhaps also entirely a matter of state practice with which this court would not concern itself.

1. Upon general principles of procedure, it would seem that mandamus is the proper remedy.

Cambridge & Somerville vs. Charlestown Branch R. R. Co. 7 Met., 70.

This is held in numerous cases to be a proper form of remedy.

N. P. R. R. Co. vs. Washington, 142 U. S. 492.

Township of Grosse Pointe vs. Detroit &c. St. R. R. Co., 90 N. W. Rep. 42.

People vs. Suburban R. R. C., 378 Ill. 594, 598.

2. The practice in Massachusetts since the decision of the cases at bar by the state court seems to be in favor of the proceedings in equity, either under general chancery procedure or under the special terms of the statute.

Gardner vs. Templeton St. Ry. Co., 184 Mass. 294.

Newcomb vs. Norfolk Western St. Ry. Co., 179 Mass. 449.

3. Contract lies for work done by the city, which was required by the conditions, and which the company refused to do.

Indianapolis & Cincinnati R. R. Co. vs. Lawrenceburg, 34 Ind. 304.

State vs. J. S. R. R. Co., 29 Fla. 590.
Fresno vs. Fowler Canal Co,. 68 Cal. 359.
Detroit vs. Fort Wayne &c. R. R. Co., 95 Mich. 456.
Booth on Street Railways, sec. 261 and cases cited.
City of Newport vs. South Covington & Cincinnati St. Ry. Co., 89 Ken., 29.

Respectfully submitted,

ARTHUR P. RUGG,
Counsel for Plaintiffs in Error

JOHN R. THAYER,
of Counsel.

APPENDIX A.

C. 148, MASS. LAWS OF 1861.

AN ACT
TO INCORPORATE THE WORCESTER HORSE RAILROAD COMPANY.

Be it enacted, &c., as follows:

Section 1. Albert Curtis, Loring Coes, William H. Heywood, John C. Mason, Frederic W. Paine, Joseph Sargeant, and James H. Wall, their associates and successors, are hereby made a corporation by the name of the Worcester Horse Railroad Company, with power to construct, maintain and use a railway, with convenient single or double tracks, from such point or points on Main Street, in the city of Worcester, as shall be from time to time fixed by the mayor and aldermen of said city, with the assent, in writing, of said corporation, filed in the office of the city clerk of said city; then upon and over such street or streets, and such highway or highways, as shall be designated by a vote of the mayor and aldermen of said city.

Section 2. The corporation hereby created, in crossing all the branches and lateral tracks of any other railroad company, shall cross in such a manner as not to injure any of the said tracks or branches, and the rails thereof, and shall insert no frogs therein, and make no incisions into the rails thereof without the consent of said company, but shall cross the same as the Watertown branch of the Fitchburg Railroad Company is now crossed in Watertown, by the Waltham and Watertown Railroad Company, unless some other arrangement shall be made between said companies.

APPENDIX A. Continued.

Section 3. Said tracks or roads shall be operated and used by said corporation with horse-power only. The mayor and aldermen of the city of Worcester shall have power, at all times, to make all such regulations, as to the rate of speed and mode of use of the tracks, as the public safety and convenience may require.

Section 4. Said corporation shall keep and maintain in repair such portion of the streets and highways respectively, as shall be occupied by their tracks, and shall be liable for any loss or injury that any person may sustain, by reason of any carelessness, neglect or misconduct of any of its agents and servants in the management, construction or use of said roads, tracks or highways; and in case any recovery shall be had against said city of Worcester, by reason of such defect or want of repair, said corporation shall be liable to pay to said city of Worcester any sums thus recovered against said city, together with all costs and reasonable expenditures, incurred by said city in the defence of any such suits, in which recovery may be had; and said corporation shall not use any portion of the streets or highways not occupied by said road or tracks.

Section 5. If any person shall wilfully and maliciously obstruct said corporation in the use of said road or tracks, or the passing of the cars or carriages of said corporation thereon, such person, and all who shall be aiding or abetting therein, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the common jail for a period not exceeding three months.

Section 6. If said corporation, or its agents or servants, shall wilfully and maliciously obstruct any highways, or the passing of any carriages over the same, such corporation shall be punished by a fine not exceeding five hundred dollars.

APPENDIX A. Continued.

Section 7. The capital stock of said corporation shall not exceed one hundred thousand dollars, to be divided into shares of one hundred dollars each.

Section 8. Said corporation shall have power to purchase and hold such real estate within said city of Worcester, as may be convenient or necessary for the purposes and management of said road.

Section 9. The said road shall be constructed and maintained in such form and manner, and upon such grade as the mayor and aldermen of said city of Worcester may in their votes, fixing and determining the routes thereof, as aforesaid, prescribe and direct; and whenever in the judgment of said corporation it shall be necessary to alter the grade of any street so occupied by it, such alteration may be made at the sole expense of said corporation: *provided,* the same shall be assented to by the mayor and aldermen of said city of Worcester.

Section 10. Nothing in this act shall be construed to prevent the mayor and aldermen of said city from entering upon and taking up any of the public streets or highways traversed by said railroad, for any purpose for which they may now lawfully take up the same.

Section 11. At any time after the expiration of one year from the opening for the use of the tracks of said railroad in any street or road in which the same shall be located, as provided by its charter, the mayor and aldermen of the city of Worcester may determine as to so much of said tracks as is located with said city, that the same, or any part thereof, be discontinued; and thereupon the location shall be deemed to be revoked, and the tracks of said railroad shall forthwith be taken up and removed, in conformity with the order of said mayor and aldermen of the city of Worces-

ter; and such taking up and removal shall be at the expense of said railroad corporation.

Section 12. The city of Worcester may, at any time during the continuance of the charter of said corporation, and after the expiration of ten years from the opening of any part of said road for use, purchase of said corporation all the franchise, property, rights, and furniture of said corporation, by paying therefor such a sum as will reimburse to each person who shall then be a stockholder therein, the par value of his stock, together with a net profit of ten per cent. per annum from the time of the transfer of said stock to him on the books of the corporation, deducting the dividends received by said stockholders thereon.

Section 13. This act shall be void, so far as relates to the right to construct said road in said city of Worcester, unless the same shall be accepted by the mayor and aldermen of said city of Worcester, and unless the same shall be accepted by said corporation, and unless said road shall be located within two years from the passage of this act.

Section 14. Said corporation shall be deemed a railroad corporation, so far as to be subject to make such annual returns to the legislature as are, or may be prescribed by law; and also so far as to be subject to all existing provisions of law for the assessment and payment of damages for the land outside of the streets and highways taken by them for tracks; and to all general provisions of law that are, or may be, prescribed relative to horse or street railroads.

Section 15. This act shall take effect upon its passage.

Approved April 6, 1861.

APPENDIX B.

C. 181, MASS. LAWS OF 1866.

AN ACT
TO INCORPORATE THE COHASSETT AND SCITUATE STREET RAILWAY COMPANY.

Be it enacted, &c., as follows:

Section 1. Joseph O. Cole, John D. Nichols, Nathaniel H. Whiting, their associates and successors, are hereby made a corporation, by the name of the Cohasset and Scituate Street Railway Company, for the purpose of constructing and using a street railroad from some convenient point near the depot of the South Shore Railroad, in the town of Cohasset, to some convenient point in that part of the town of Scituate called Scituate Harbor; with all the powers and privileges, and subject to all the duties, liabilities and restrictions set forth in all general laws which now are or may hereinafter be in force relating to street railroads.

Section 2. The capital stock of said corporation shall not exceed the sum of seventy-five thousand dollars, to be divided into shares of one hundred dollars each.

Section 3. This act shall take effect upon its passage.

Approved April 25, 1866.

APPENDIX C.

SCHEDULE OF SPECIAL ACTS OF INCORPORATION OF STREET RAILWAY COMPANIES PASSED BY THE LEGISLATURE OF MASSACHUSETTS BETWEEN 1853 AND 1871, BOTH INCLUSIVE (THE STATUTES AUTHORIZING PURCHASE BY MUNICIPALITIES ARE INDICATED BY REFERENCE TO SECTIONS .

PART I*

See

Metropolitan Railroad Co., Laws of 1853, chap 353, sec. 7.

Cambridge Railroad Co., Laws of 1853, chap. 383, sec. 7.

Western Avenue Railroad Co., Laws of 1854, chap. 446, sec. 7.

Broadway Railroad Co., Laws of 1854, chap. 444, sec. 7.

Dorchester Avenue Railroad Co., Laws of 1854, chap. 435, sec. 7.

Metropolitan Railroad Co., Laws of 1854, chap. 94, sec. 4. (in addition to an act to incorporate.)

Middlesex Railroad Co., Laws of 1854, chap. 434, sec. 3.

Boston & Chelsea Railroad Co., Laws of 1854. chap. 445, sec. 9.

Medford & Charlestown Railroad Co., Laws of 1855, chap. 336. sec. 3.

Waltham & Watertown Railroad Company, Laws of 1855, chap. 408, sec. 8.

Newton Railroad Company, Laws of 1857, chap. 278, sec. 7.

Suffolk Railroad Company, Laws of 1857. chap. 285, sec. 13.

*These statutes all authorize purchase of the street railway company by the municipality.

APPENDIX C. Continued.

West Roxbury Railroad Company, Laws of 1856, chap. 201, sec. 7.

Brookline Railroad Company, Laws of 1857, chap. 304. sec. 12.

Dorchester & Roxbury Railroad Co., Laws of 1857, chap. 256, sec. 7.

West Cambridge Horse Railroad Co., Laws of 1857, chap. 242, sec. 7.

Winnisimmet Railroad Company, Laws of 1857, chap. 227, sec. 8.

West Roxbury Railroad Co., Laws of 1857, chap. 230, sec. 7, (in addition to an act to incorporate.)

Chelsea Beach Railroad Company, Laws of 1858, chap. 29, sec. 9.

West Roxbury Railroad Company, Laws of 1858, chap. 38, sec. 8. (in addition to an act to incorporate.)

Dorchester Extension Railway, Laws of 1859, chap. 43, sec. 8.

Melrose & So. Reading Railroad Co., Laws of 1860, chap. 35, sec. 12.

Stoneham Street Railroad Company, Laws of 1860, chap. 19, sec. 12.

Belmont Horse Railroad Company, Laws of 1861, chap. 90, sec. 14.

Dedham & West Roxbury Railroad Co., Laws of 1861, chap. 135, sec. 14.

Quincy Railroad Company, Laws of 1861, chap. 48, sec. 9.

Salem & So. Danvers Railroad Co., Laws of 1861, chap. 63, sec. 12.

Winthrop Railroad Company, Laws of 1861, chap. 89, sec. 13.

Worcester Horse Railroad Company, Laws of 1861, chap. 148, sec. 12.

APPENDIX C. Continued.

Lowell Horse Railroad Company, Laws of 1863, chap. 172, sec. 11.

Melrose & So. Reading Horse R. R. Co., Laws of 1863, chap. 170, sec. 12.

Merrimack Valley Horse Railroad Co., Laws of 1863, chap. 207, sec. 12.

Springfield Horse Railroad Co., Laws of 1863, chap. 121, sec. 12.

Union Freight Horse Railroad Co., Laws of 1863, chap. 241, sec. 7.

Newburyport & Amesbury Horse R. R. Co., Laws of 1864, chap. 53, sec. 11.

Chelsea & East Boston Street R. R. Co., Laws of 1865, chap. 199, sec. 5.

Springfield Street R. R. Co., Laws of 1868, chap. 63, sec. 4.

PART II*

Cambridgeport Railroad Co., Laws of 1855, chap. 415.

Dorchester Avenue Railroad Co., Laws of 1855, chap. 201, (in addition to an act to incorporate.)

Dorchester Avenue Railroad Co., Laws of 1856, chap. 66, (in addition to an act to incorporate.)

Malden & Melrose Railroad Co., Laws of 1856, chap. 302.

Somerville Horse Railroad Co., Laws of 1857, chap. 250.

Cliftondale Railroad Co., Laws of 1859, chap. 144.

Lynn & Boston Railroad Co., Laws of 1859, chap. 202.

Cliftondale Railroad Co., Laws of 1860, chap. 17, (in addition to an act to incorporate.)

*These statutes do not authorize purchase by municipality.

APPENDIX C. Continued.

Charlestown Freight Railroad Co., Laws of 1861, chap. 15.

Duxbury Railroad Co., Laws of 1861, chap. 147.

South Danvers & Lynn Street Railway Co., Laws of 1864, chap. 252.

Northampton & Williamsburg Street Railway Co., Laws of 1865, chap. 128.

Brookline & Back Bay Street Railway Co, Laws of 1866, chap. 240.

Cohasset & Scituate Street Railway Co., Laws of 1866, chap. 181.

Commercial Freight Railway Co., Laws of 1866, chap. 267. (freight only).

Duxbury Street Railroad Co., Laws of 1866, chap. 155.

New Bedford Street Railroad Co., Laws of 1866, chap. 156.

North Woburn Street Railroad Co., Laws of 1866, chap. 108.

Waltham & Newton Street Railroad Co., Laws of 1866, chap. 214.

Marginal Freight Railway Co., Laws of 1867, chap. 170, (freight only.)

Northampton, Hadley & Amherst Street Railway Co., Laws of 1867, chap. 90.

Worcester Street Railway Co., Laws of 1867, chap. 141.

Albany Street Freight Railway Co., Laws of 1868, chap. 97, (freight only.)

Arlington & Lexington Street Railway Co., Laws of 1868, chap. 40.

Graves End Branch Street Railway Co., Laws of 1868, chap. 22.

Newburyport & Plum Island Street Railway Co., Laws of 1868, chap. 90.

APPENDIX C. Continued.

Nonantum Horse Railroad Co., Laws of 1868, chap. 151.

South Boston Freight Railway Co., Laws of 1868, chap. 175, (freight only.)

Springfield Street Railway Co., Laws of 1868, chap. 63, sec. 4.

Westfield Street Railway Co., Laws of 1868, chap. 148.

Boston & Lynn Union Railway Co., Laws of 1869, chap. 397.

Hyde Park Branch Railway Co., Laws of 1869, chap. 280.

Merrimack Street Railway Co., Laws of 1870, chap. 320.

Taunton Street Railway Co., Laws of 1870, chap. 18.

Worcester & Shrewsbury Street Railway Co., Laws of 1870, chap. 233.

Everett & Chelsea Street Railway Co., Laws of 1871, chap. 132.

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JAMES H. McKENNEY,
Clerk.

That boards of aldermen in Massachusetts have no authority in granting locations to a street railway company to enter into any contract in behalf of their respective cities with the street railway company, was decided by the supreme judicial court of Massachusetts in the case of

Cambridge *vs.* Cambridge R. R. Co. *et al.*,

the facts of which case are set out on page 25 of this brief.

The language of the court on this point is as follows:

"Certainly no right or authority * * * to enforce any supposed agreement or condition is vested in the mayor and aldermen, under the general powers and duties devolved on them by law, as officers acting for the city. Nor is there any such right or authority vested in them by the acts incorporating the defendants."

Then comes passage quoted on page 24 of this brief:

"But we look in vain for any provision of law which authorizes them to act in behalf of the city, *either in making any contracts with the defendants*, or in enforcing in their names or in their official capacity, any contract created by law, with the city or the public, under the acts incorporating the defendants. If the conditions on which the location of the road or any part of it was granted to the defendants can be properly regarded as a contract—a point not necessary now to determine—it was not one to which the mayor and aldermen were a party or which they are capable of enforcing."

"The provisions of St. 1864, chapter 229, sections 20, 45, confer no power on the mayor and aldermen to maintain this bill."

Cambridge *vs.* Cambridge R. R. Co. *et al.*, 10 Allen, 50.